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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 793

LOUISIANA FINANCIAL ASSISTANCE COMMISSION: E. W. Gravolet, Jr., James R. Leake, James D. Fountain, and Lantz Womack, officers and members of the Louisiana Financial Assistance Commission, et al

Appellants

v.

BRYAN POINDEXTER, a minor, by LORRAINE POINDEXTER, his mother and next friend; ALFRED LOUIS LARKS, a minor, by CHARLES LARKS and CORA LEE LARKS, his parents and next friends; ANTHONY JARROW, a minor, by PETER JARROW and RUBY JARROW, his parents and next friends; on behalf of themselves and other Negro children and their parents similarly situated,

Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

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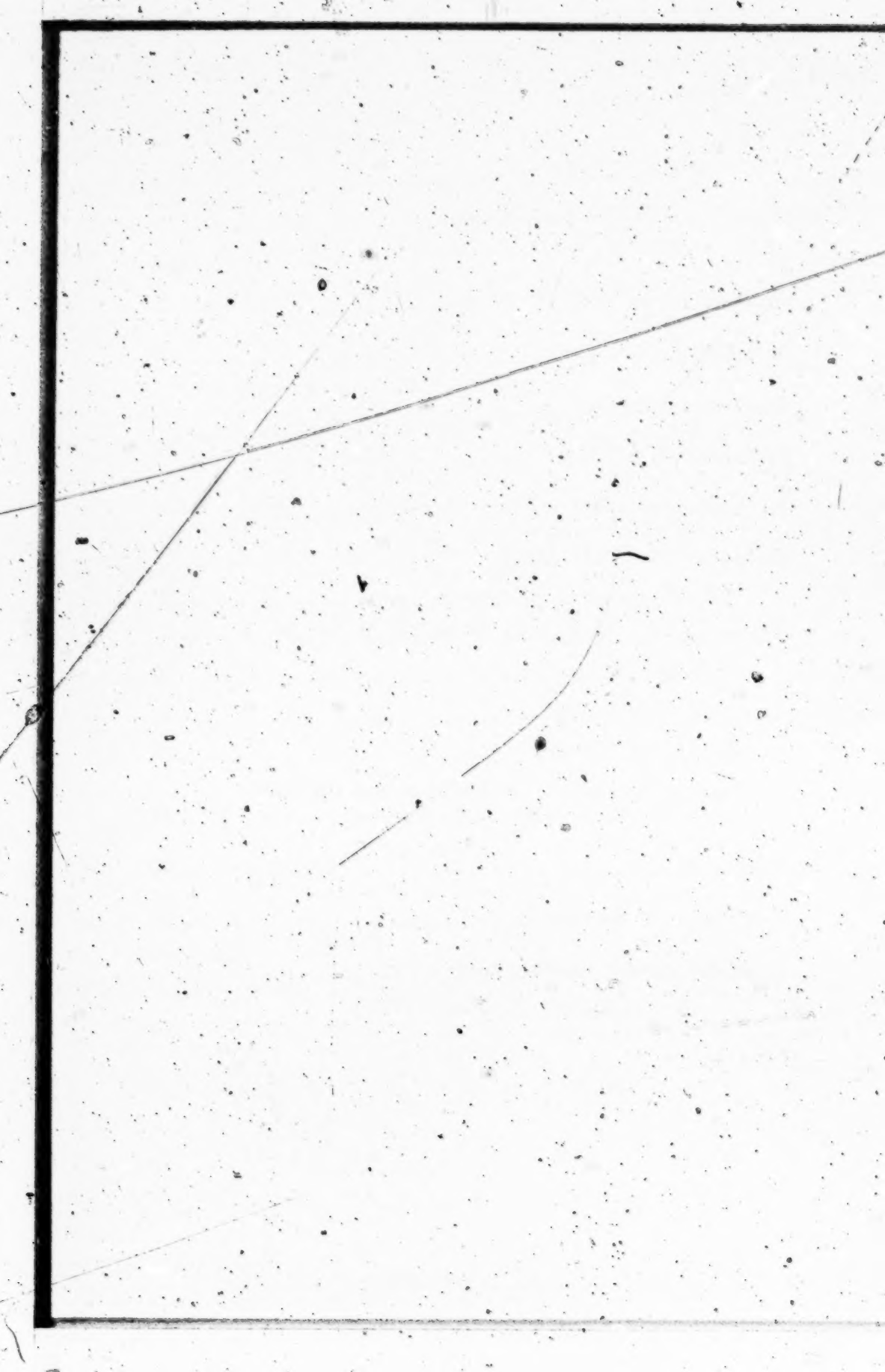

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STATEMENT AS TO JURISDICTION

The Appellants, pursuant to United States Supreme Court Rule 13 (2) and 15, file this statement to show the basis upon which the Supreme Court of the United States has jurisdiction on a direct appeal to review the final decree of permanent injunction in question and should exercise such jurisdiction in this case.

OPINIONS BELOW

The first opinion delivered in the lower Court was on a motion to dismiss the complaint for lack of standing on the part of all the plaintiffs. The citation to this opinion is Civil Action No. 14683, Docket of the Eastern District Court, 258 F.Supp. 158 (E.D., La., August 4, 1966). That opinion denied the motion to dismiss and, inter alia, stated it was not to form the basis for a motion for summary judgment. A copy thereof is in the appendix hereto.

The second opinion delivered in the lower Court was on the merits after a full trial. As it is yet unreported, it's only citation is Civil Action No. 14683, Docket of the Eastern District Court decided August 25, 1967 and entered August 26, 1967. That opinion enjoined the enforcement of Act 147 of the 1962 Session of the Louisiana Legislature. A copy thereof is in appendix hereto.

JURISDICTION

The several grounds upon which the jurisdiction of this Court is invoked are as follows:

(i) The proceedings below were in the nature of a complaint seeking an interlocutory and permanent injunction under Civil Rights Act of 1870, 42 U.S.C. 1981-1983 and under 28 U.S.C. 1343(3) restraining the enforcement, operation, or execution of an Act of the State of Louisiana, to wit, Act 147 of 1962 (R.S. 17:2951-2959) on the basis of its alleged repugnance to the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

(ii) The final decree appealed from was dated August 25, 1967 and entered on August 26, 1967. No rehearing was sought in the Court below. Notice of Appeal was filed in the

United States District Court for the Eastern District of Louisiana on September 8, 1967.

(iii) The Supreme Court of the United States has jurisdiction to review by direct appeal the judgment and decree complained of by provision 28 U.S.C. § 1253.

(iv) The following decisions are believed to sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *Florida Lime & Avocada Growers, Inc. v. Jacobsen,* 362 U.S. 73 and *U.S. v. Georgia Public Service Commission,* 371 U.S. 285.

(v) The validity of Act 147 of the Legislature of Louisiana for the year 1962 is involved. This act is found on pages 337 through 344 of the official acts of that year and in the Louisiana Revised Statutes under Title Seventeen as Sections 2951 through 2959. The full text of the act is set forth in the appendix hereto.

QUESTIONS PRESENTED

1) Whether the complaint should be dismissed for lack of standing of petitioners to question by action in the federal courts the use of state funds inasmuch as they allege no special interest in such funds.

2) Whether the Attorney General of the United States as intervenor had the right to challenge the constitutionality of Act 147 of the Louisiana Legislature for 1962 when the plaintiffs did not do so and their counsel stated in open Court that they deliberately chose not to do so, and did not amend their pleadings to do so despite the suggestion to that effect from the Court; and whether the Attorney General whose authority to intervene is derived from and limited by the Civil

Rights Act of 1964 may alter or enlarge the prayer of the complainants, or must take the issues as he finds them.

3) Whether in determining the constitutionality of legislation a Court may inquire into the motives of particular legislators.

4) Whether newspaper articles of current date containing alleged statements of legislators relative to legislation then under consideration are admissable as evidence to determine the constitutionality of the legislation.

5) Whether the provisions of the Civil Rights Act of 1964 relative to desegregation of schools represents a Congressional declaration of a uniform standard which the Courts should apply throughout the nation.

6) Whether the Court erred in its interpretation of the mandate in *Brown v. Board of Education of Topeka*, 347 U.S. 488.

7) Whether Act 147 of the 1962 Louisiana Legislature may be regarded as rendered unconstitutional by reason of prior acts of the Legislature, and finally, whether the act is unconstitutional.

Statement of the Case (Rule 15 1(d)

Act 147 of 1962 provides from funds not otherwise appropriated for education tuition grants for the parents of children eligible for public school education who choose to attend private non-sectarian schools. Nothing in the Act relates to race or color. Nothing in the policies of the Louisiana Financial Assistance Commission relates to race or color nor does race or color enter into the administration of the

Act, and the parents of Negro children and white children receive such grants. See appendix

The plaintiffs complain that their children were not admitted to private schools although children in attendance receive tuition grants from the Louisiana Financial Assistance Commission. They allege that they are Negroes and that their children are denied admission on that basis. They do not ask that such schools be declared to be public schools. They do not allege that public schools are closed; on the contrary the pleadings and the evidence show without dispute that the public schools are open. They do not ask that the private schools be required to receive Negro children. They do not ask in their complaint that Act 147 of 1962 be declared unconstitutional and their counsel stated in oral argument that their decision not to do so was deliberate and declined to amend their complaint in this respect when the Court suggested that they do so. Nevertheless, they ask that the defendants be enjoined from paying tuition grants to children attending such schools. They do not qualify this prayer by relating the question to the extent to which tuition paid by parents of children receiving grants contribute to the operating expenses of the school. They complain that it is illegal to permit any funds at all paid to parents as tuition grants to reach these private schools.

Nearly two years after the suit was filed, the United States Attorney General, purporting to act only under the Civil Rights Act of 1964, Sec. 902, 42 U.S.C. Sec. 2000 h-2, entered the suit as an intervenor and over the objection of the defendants amended the complaint to plead the unconstitutionality per se of Act 147 of 1962 irrespective of its administration.

Stipulations and undisputed evidence show that many

Negroes have received tuition grants; that no requests from Negroes have been denied; that no public schools have been closed; that the State of Louisiana, its Parishes and Municipalities spent $378,368,910.00 for the year 1965-66 year on the public schools, not counting capital investments; that the State tuition grants were $3,821,984.00, (about one per cent), drawn from appropriations separate from and without diminution of the appropriations made for public schools; that there were 793,173 children of both races in the public schools for the 1965-66 year; that there were only 14,564 children in the private non-sectarian schools (less than two per cent); and that neither the Commission nor its members exercise any control over the private schools.

The District Court did not find anything wrong with the provisions of Act 147, nor with its administration. Indeed the Court took pains to compliment Mr. James Fountain as Director of the Commission in his administration of the act. (See page ..... of the opinion in the Appendix hereto.) However, the District Court makes it clear in the third paragraph of its forty-four page opinion that it considers the Act unconstitutional on the basis of what it determined to be the motive for the Act.

Louisiana gives school books to children whether they attend public or private schools and in many cases lunches as well. Grave concern had been expressed as to whether nullification of tuition grants to children would also nullify grants of school books. The District Court said:

> "The free lunches and textbooks Louisiana provides for all its school children are the fruits of racially neutral benevolence. Tuition grants are not the products of such a policy. They are the fruits of the State's traditionally biased policy of providing segregated schools for white pupils. Here that policy has pushed the State to the extreme of using public funds

> to aid private discrimination endangering the public school system and equal educational opportunities for Negroes in Louisiana."

In the quoted statement the Court refers to "policy" rather than referring to "purpose" which may be considered in constitutional questions and rather than referring to "motive" which may not properly be considered. The thrust of the opinion shows that the Court was actually concerned by what it considered to be the motive of the legislators.

THE QUESTIONS PRESENTED ARE SO SUBSTANTIAL AS TO REQUIRE PLENARY CONSIDERATION RULE 15 1(f)

This case is of importance because the District Court has declared unconstitutional an Act which is valid on its face and the effect of which can be helpful to the state and nation, and has done so on the basis of statements attributed by newspapers to individual legislators and officials and by resort to history of discrimination against Negroes in the past. If such tests are allowed to stand, the Court will have departed from standards heretofore set for the determination of the constitutionality of statutes.

In the important field of validity or constitutionality, Cooley long ago declared:

> *"The validity of legislation can never be made to depend on the motives which have secured its adoption, whether these be public or personal, honest or corrupt.* There is ample reason for this in the fact that the people have set no authority over the legislators with jurisdiction to inquire into their conduct, and to judge what have been their purposes in the pretended discharge of the legislative trust. This is a jurisdiction which they have reserved to themselves

exclusively, and they have appointed frequent elections as the occasions and the means for bringing these agents to account. A further reason is, that *to make legislation depend upon motives would render all statute law uncertain, and the rule which should allow it could not logically stop short of permitting a similar inquiry into the motives of those who passed judgment.* Therefert the courts do not permit a question of improper legislative motives to be raised, but they will in every instance assume that the motives were public and befitting the station. They will also assume that the legislature had before it any evidence necessary to enable it to take the action it did take." Cooley, *Constitutional Law*, Chapter XV, p. 199. (*Italics here and hereinafter ours unless otherwise noted.*)

Education other than parental began with private schoolmasters and schools and has nearly always led the way in America often with public aid. Gabel, *Public Funds for Church and Private Schools.* Federal funds are similarly available without requiring the private schools which take students receiving aid to integrate the races. 38 U.S.C. 1601 (veterans); 38 U.S.C. 1701 (war orphans); and 20 U.S.C. 401 (needy students with demonstrated abilities).

The purpose of Act 147 of 1962 is declared thus:

". . . the Legislature of Louisiana, mindful of the need for literate and informed citizenry, and being desirous of advancing the cause of education generally, hereby declares that it is the policy of this state to encourage the education of all the children of Louisiana. In furtherance of this objective, and to afford each individual *freedom in choosing public or private schooling,* the Legislature finds that it is desirable and in the public interest that financial assistance should be provided from the public funds of the state for education of the children in private non-sectarian elementary or secondary schools in this State."

The purpose is lawful. Parents have the recognized constitutional right to send their children to private schools rather than to public schools. *Pierce v. Society of the Sisters*, 268 U.S. 510. It is not fair to say that only the wealthy may exercise that constitutional right, and it has never been considered an unlawful use of public money, either federal or state, to make tuition grants for educational purposes even though the recipient chooses to pay the tuition to a private school.

The State of Louisiana does not require the private schools to be conducted on a segregated basis. Such a requirement would be in violation of the decision of this Court in *Brown v. Board of Education of Topeka*, supra. The State of Louisiana does not forbid segregation in the private schools outright nor as a condition to granting aid to children attending such school. The *Brown* decision did not explicitly impose such a duty nor do we think it did so implicitly. The Civil Rights Act of 1964, as we understand it, and as the United States District Court for the Eastern District of Virginia understands it, imposes a limitation upon state aid and that Court held that the Constitution imposed a like limitation. *Griffin v. State Board*, 239 F. Supp. 560 (1965) but the same decision held the Virginia grant-in-aid statute to be constitutional per se.

The Louisiana Financial Assistance Commission has accepted the rule of the Civil Rights Act of 1964 and of the Griffin case, supra, and has so limited the aid it will grant. See Resolution in the appendix. But the Attorney General of the United States and the District Court are not satisfied with that limitation and, in effect, say that *any* state aid to any student who attends a private school that has not integrated is unconstitutional.

The District Court apparently recognizes that such a ruling cannot be justified in whole, hence its approval of state aid to students attending segregated private schools if limited to free school books and lunches because it says:

> "The free lunches and textbooks Louisiana provides for all its school children are the fruits of racially neutral benevolence. Tuition grants are not the products of such a policy."

Purpose is frequently confused with motive. The first Mr. Justice Harlan put this clearly in his opinion in *People v. Roberts*, 171 U.S. 658. While this was a dissenting opinion, his views on that point, as on many others, have become the law. The majority in deciding a corporation tax case had sustained a greater tax burden on a foreign corporation manufacturing elsewhere than would have been imposed if the company's manufacturing plant had been in New York. The majority held that if favoring the local manufacturer had been the object of the law it would have been unconstitutional as "tending to affect or regulate commerce between the states. But we think that obviously such is not the purpose of this legislation." Justice Harlan, dissenting, said: "In a legal sense the object or purpose of legislation is to be determined by its natural and reasonable effect whatever may have been the motives of the legislature" adding that constitutionality is not to be determined by purpose "if by 'object' or 'purpose' is meant the motive which controlled members of the state legislature when they enacted such legislation." 171 U.S. 658.

Motive was used as a test in *Hammer v. Dagenhart*, 247 U.S. 251, (1918) but in *United States v. Darby*, 312 U.S. 100, (1941) concerning the Fair Labor Standards Act, Justice, later Chief Justice Stone, rejected the reasoning of *Hammer v. Dagenhart*. Shortly afterwards, in *Daniel v. Family Security Life Ins. Co.*, 336 U.S. 220, 224, (1949), Justice Murphy

speaking for a unanimous Court said "[w]e cannot undertake a search for motive in testing constitutionality."

The distinction thus marked by this Court has been well understood. There are many citations which might be given. We choose a few. In *Hudson v. The American Oil Company*, 152 F.Supp. 757, 770, (E.D. Va. 1957) the Court said, "Motive is that which prompts the choice or moves the will, thereby inciting or inducing action, while 'purpose' is that which one sets before himself as the end, aim, effect or result to be kept in view or object to be attained."

In *Shuttlesworth v. Birmingham Board of Education of Jefferson County Alabama*, 162 F.Supp. 372, 381, (N.D. Ala. 1951) Judge Rives, Circuit Judge, speaking for the Court constituted under 28 U.S.C. 2281, upheld the constitutionality of a student-placement law, saying:

> *"In testing constitutionality 'we cannot undertake a search for motive.' 'If the State has the power to do an act, its intention or the reason by which it is influenced in doing it cannot be inquired into.' Doyle v. Continental Insurance Co., 94 U. S. 535, 541, 24 L.Ed. 148. As there is no one corporate mind of the legislature, there is in reality no single motive. Motives vary from one individual member of the legislature to another."*

This Court affirmed, thus:

> "The motion to affirm is granted and the judgment is affirmed upon the limited grounds on which the district court rested its decision. 162 F.Supp. 372, 384." 358 U.S. 101.

In the even more recent case of *United States v. Miller*, 367 F.2d 72, 76, (2nd Cir. 1966) cert. denied Feb. 13, 1967, in-

volving the military draft laws, the Second Circuit Court again announced the rule we assert:

> "Appellant contends that the 1965 amendment is unconstitutional (1) on its face, because it's legislative history establishes that it was enacted deliberately to suppress dissent; (2) as applied to the facts of this case, because the conduct it punishes this defendant for is symbolic speech protected by the First Amendment; and (3) under the Fifth Amendment because it serves no rational legislative purpose.
>
> "As to the first contention, going behind the terms of a statute to divine the collective legislative motive for its enactment is rarely, if ever, done by a court. Thus, in *Sonzinsky v. United States*, 300 U.S. 506, 513-514, 57 S.Ct. 554, 556, 81 L.Ed. 772 (1937), the Supreme Court stated that '[i]nquiry into the hidden motives which may move Congress to exercise a power constitutionally conferred upon it is beyond the competency of Court.'"

While the Court was there dealing with an Act of Congress, it cited the *Daniel* case, supra, which dealt with a state statute as one of the several authorities for the rule; and we believe the same rule which applies to consideration of an Act of Congress must be applied to consideration of a state statute.

We are not unmindful of *Gomillion v. Lightfoot*, 364 U.S. 339, 345, (1960) which involved state gerrymandering of legislative districts which the plaintiffs claimed would "deny them the right to vote in defiance of the Fifteenth Amendment." The *result* of that Alabama Act, *not* the motives of the legislators who enacted it, was at stake. The plaintiffs were residents of Tuskegee and had the right to vote there. The legislation would have deprived them of that right.

The Court reasoned that the authority of states to reorganize cities is not absolute, referred to decisions protecting contractural rights in such instances and added:

> "If all this is so in regard to the constitutional protection of contracts, it should be equally true that, to paraphrase, such power, extensive though it is, is met and overcome by the Fifteenth Amendment to the Constitution of the United States, which forbids a state from passing any law which deprives a citizen of his vote because of his race." 364 U.S. 334, 345.

The Fifteenth Amendment is unique. Deprivation of the right to vote does not violate it. It is only when the right is denied or abridged by the United States or by any state *"on account of race, color, or previous condition of servitude"* that the amendment is violated. Even under the unique language of the Fifteenth Amendment, *the purpose or necessary effect* of the law, not the motives of the legislature, was the subject of inquiry and as in all such cases, it is what the law requires which determines its constitutionality or unconstitutionality per se.

In the voter qualification case *United States v. State of Louisiana*, 225 F. Supp. 353 (1963), the Court had to deal with the so called "interpretation" section of the Louisiana Constitution. The principle now discussed was recognized thus:

> "In going beyond the verbal surface of the Louisiana interpretation test, we have sought to eschew inquiry into motive. A federal court's proper respect for the State and the judiciary's due regard for the legislative process, among other reasons, compel this restraint." 225 F.Supp. 353, 361.

In that case, the Court was again dealing with the Fifteenth Amendment and its controlling phrase "on account of

race," of course, had to be dealt with. The Court cited *Gomillion*, supra, which dealt with the same problem and said "[t]he legislative purpose and *inevitable* effect of a law non-discriminatory on its fact may be decisive in determining the constitutionality of the law." 225 F.Supp. 353, 362.

In our view, the "interpretation" clause might well have been declared unconstitutional on its face, for it confided to a registrar of voters solely determination of what clause of the constitution must be interpreted by the prospective voter and whether the interpretation given was reasonable. So subjective a test could never be valid in a system of government by law; and, if the government were wholly dictatorial and arbitrary, there woull be no need to make pretense with any test. Moreover, all of the series of laws on the subject had the same effect—namely, to deprive Negroes of their vote. Even the original "grandfather" clause was to let the illiterate white man vote while preventing the illiterate Negro from doing so.

In *Brown*, supra, laws which *required* segregated schools for Negro children and white children were declared unconstitutional, but *not* on account of the motives which may have led to their enactment. The conclusion of the Court is not left in doubt. It stated:

> "We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and other similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment." 347 U.S. 483, 495.

Thus the question was and always should be what the

law itself requires, not the motives which led the lawmakers to put it on the books.

It is not disputed that many more white children are receiving grants than are Negro children, but this is only because the parents of Negro children have not sought the grants in as great numbers. None have been turned away, and it is a serious thing to the nation to test the constitutionality of statutes by the numbers of people of the different races who seek its benefits.

In *United States v. Jefferson County Board of Education, et al.*, 372 F.2d 836 (1966); 380 F.2d 385 (1967) (Cert. Denied by this Court in October 1967), the Fifth Circuit itself recognized with respect to the public schools that relatively few Negro children were attending schools formerly attended only by white children in Louisiana and dealt at length with integration but in its decree recognized that short of complete regimentation the Court must depend upon a free exercise of choice by children or their parents. What else could be done other than to enforce some sort of a quota system irrespective of the wishes of the children or their parents and irrespective of cost! However wise a quota plan might be, little would remain of freedom or liberty. We call to the Court's attention *Clark v. The Board of Education of the Little Rock District*, 369 F.2d 661, 666 (December 15, 1966) in which it was said:

> "Plaintiffs are disturbed because only 621 of 7,341 Negroes in the Little Rock school system of 23,003 (as of 1965) were actually attending previously all white schools. Thus, they argue that the 'freedom of choice' plan is not succeeding in the integration of the schools.
>
> * * *
>
> "We find no unlawful discrimination in the giving of students a free choice of schools. The system is

> not subject to constitutional objections simply because large segments of whites and Negroes choose to continue attending their familiar schools. It is true that statistics on actual integration may tend to prove that an otherwise constitutional system is not being constitutionally operated. However, these statistics certainly do not conclusively prove the unconstitutionality of the system itself.
>
> * * *
>
> "In short, the Constitution does not require a school system to force a mixing of the races in school according to some predetermined mathematical formula. Therefore, the mere presence of statistics indicating absence of total integration does not render an otherwise proper plan unconstitutional."

In *Griffin v. Board of Supervisors*, supra, the District Court for the Eastern District of Virginia was confronted with the averment that the Negro had no private schools to go to and was thus denied equal protection of the law. The Court said that if correct the argument related to an economic, not a constitutional obstruction.

Moreover in the *Jefferson County* case, supra, the Court noted that one of the problems is that "[m]any Negro children, for various reasons, prefer to finish school where they started." Of course, neighborhood problems continue to influence the composition of particular schools, and federal courts elsewhere have concluded that school boards are not required to move the children about in busses to break that situation. 372 F.2d. 836, 849.

Matters In Which It Is Contended That The Court Abused Its Discretion By Granting The Injunction Sought (Rule 15 1(g)

The stated purpose of the Act is legal. Its effect is to give tuition grants to Negro children as well as to white children

who attend private schools. The State does not operate or control these schools and does not require segregation by them. The Act makes tuition grants available to children attending integrated non-sectarian private schools. The Newman High School has announced an open-door policy and grants will be made available to students attending the famous New Orleans school. The constitutionality of this statute is not to be tested by the numbers of the different races making use of it. Nevertheless, the Court declared the Act null on the basis of previous Louisiana history and newspaper quotations of particular legislators. Both approaches are erroneous.

A. History

The Court said:

> "As certainly as '12' is the next number of a series starting 2, 4, 6, 8, 10, Act 147 fitted into the long series of statutes the Louisiana legislature enacted for over a hundred years to maintain segregated schools for white children. * * *"

It is as though the Court itself were embattled against the Legislature and emphasizes the importance of Cooley's observation:

> "The validity of legislation can never be made to depend on the motives which have secured its adoption, whether these be public or personal, honest or corrupt.
>
> * * *
>
> "[T]o make legislation depend upon motives would render all statute law uncertain, and the rule which should allow it could not logically stop short of permitting a similar inquiry into the motives of those who passed judgment."

Of course, "12" is the next number of a series starting 2, 4, 6, 8, 10 and, of course, the government of Louisiana was opposed to the *Brown* decision and had passed earlier statutes

declared illegal by the Court, but that does not mean that Louisiana is in defiance of the Court.

Louisiana's governors have never stood at schoolhouse doors to bar children nor have they called upon troops or police to do so. Disturbances in New Orleans which occurred during the first integration were handled by local and state authorities in the preservation of peace and good order. These comments are not intended to deny that there was much dismay in Louisiana with respect to the *Brown* decision. Nor do we deny that the 1958 version of a tuition grant statute was related explicitly to race and triggered by actions concerning race. Nor do we dispute that the 1960 version was tied into the "interposition" package of acts.

However, the Act now under consideration is not related to race, and action under it is not triggered by race. There is no massive resistance in Louisiana. Public schools are open, and if the integration in some communities is light in numbers, in New Orleans where the plaintiffs in this suit reside, there are 29 integrated public schools attended by 10,000 white children and 6,000 Negro children. The famous Newman High School of New Orleans has announced an open-door policy and grants will be made to students who attend it without regard to their race or color.

If we resort to history, all of us know without documentation that all over the United States there has been discrimination against Negroes in the past; that Negroes originally came to this country as slaves; the Constitution itself recognized that status in determining the representation in Congress[1] and by providing that after 1808[2] no slaves could be brought into the United States. The Missouri Compromise of

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1. Art. I Sec. 2. United States Constitution.
2. Art. I Sec. 9. United States Constitution.

1850, the *Dred Scott*[3] decision nullifying it, the gradual abolition of slavery throughout the northern part of the United States, the gradual desegregation of public schools throughout the northern part of the United States, which in many instances came long after the Civil War[4] and the Thirteenth, Fourteenth, and Fifteenth Amendments demonstrate an evolution of the law not only in Louisiana but throughout this nation. To ask this Court to declare a state law unconstitutional because of remote or recent history though neither its terms nor its administration invoke a color line is surely not justified.

The result of such an argument is to say that Act 47 of 1962 if enacted by any but Virginia, North Carolina, South Carolina, Georgia, Florida, Alabama, Mississippi, Louisiana, Texas, Arkansas—and perhaps Tennessee and Kentucky—or maybe even Maryland—would be legal, but not in these states. This is indeed to treat the southern states as if they were somewhat less than full members of the Union despite all they and their people have done to make this Union even greater since 1865. This is not contradicted by *Reitman v. Mulkey*, 387 U.S. —— (May 29, 1967); for in California the state constitutional amendment under consideration could have no other effect than to nullify laws which themselves had abrogated any color lines as to residences. Even so, Your Honors were closely divided on the point.

B. NEWSPAPER ARTICLES AS EVIDENCE

The Court permitted the Department of Justice to introduce a large number of copies of newspaper articles allegedly containing statements of members of the Louisiana Legisla-

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3. *Scott v. Sandford*, 19 Howard 343.

4. For example, Feb. 22, 1887 in Ohio as noted in *Deal et al v. The Cincinnati Board of Education*, 369 F.2d. 55.

ture during the period Act 147 of 1962 was being considered. Counsel for the Louisiana Financial Assistance Commission and its officers and members objected to the introduction of such evidence not only because it related to motives of particular persons but also on the basis that it was objectional under the well-known hearsay rule. The Court ruled that the newspaper articles would be admitted subject to counsel's objections and that a ruling would be made on this point in the opinion on the merits. Although the lower Court made extensive use of these newspaper articles in its final opinion, no ruling on counsel's objection was made.

The earliest permissible use of writings without the appearance of the author as an exception to the heresay rule is found in *Morris v. Harmer's Heirs' Lessee*, 7 Pet. 553 (1833). At page 558, Justice Story speaking for the Court stated:

> "All evidence of this sort must be considered as mere hearsay; and certainly, as hearsay, it is of no very satisfactory character. *Historical facts*, of general and public notoriety, may indeed be proved by reputation; and that reputation may be established by historical works of known character and accuracy. But evidence of this sort is *confined in a great measure to ancient facts, which do not presuppose better evidence in existence*; and where, from the nature of the transactions, or the remoteness of the period, or the public and general reception of the facts, a just foundation is laid for general confidence. See 1 Starkie's Evid. pl. 1, sec. 50 to 44, p. 60 to 64; 1 Starkie's Evid. pl. 2, sec. 55, pp. 180, 181. But the work of a living author, who is within the reach of process of the court, can hardly be deemed of this nature. He may be called as a witness. He may be examined as to the sources and accuracy of his information; and especially if the facts which he relates are of a recent date, and may be fairly presumed to be within the knowledge of many living persons, from whom

> he has derived his materials; there would seem to be cogent reasons to say that his bok was not, under such circumstances, the best evidence within the reach of the parties."

Subsequently in *Dallas County v. Commercial Union Assurance Co.*, 286 F. 2d. 388 (5th Cir. 1961) the Court permitted the introduction into evidence of a 58-year old newspaper account of a fire in the tower of a courthouse to show that char was the result of an old fire rather than recent lightening. Not until *Hall v. St. Helena Parish School Board*, 197 F. Supp. 649 (Ed. La. 1961), affirmed 1961, 368 U. S. 515, do we find the use of newspaper articles to prove a fact of current happening. It should be noted that the newspaper articles were admitted in the *Hall* case without objection from opposing counsel. Significantly, the opinion cites no authority for their use as evidence. In *United States v. Louisiana*, 225 F. Supp. 353 (1963) we again find the Court permitted the introduction of 42-year old newspaper accounts of the proceedings of the 1921 Louisiana Constitutional Convention. The *Hall* case stands out as the only example of the use of current newspaper articles to prove facts at issue. None of the scholarly reasons enumerated in the *Dallas County* case were applicable to the *Hall* case nor are they applicable to the case before this Court. The legislators and the newspaper reporters were not shown to be unavailable. Thus, the newspaper articles were improperly admitted.

C. LACK OF STANDING

The complainants say that public funds should not be used to aid private schools indirectly by tuition grants to their students. They say that the public school system is thus deprived of full support and that this is an illegal use of public funds. The facts are that the funds used for tuition grants are different from those used for public education, that funds

for public education have not been diminished and in fact had been relatively enhanced by serving a somewhat lesser number of students and by private capital being used for capital investments in private schools. Moreover, by consent it was stipulated in the record that the Governor of Louisiana would testify that Louisiana does not propose to substitute a tuition grant program for its public school system. In any event, the right to question the use of state funds is not a right granted by the United States Constitution. This Court denied such a right in *Commonwealth of Massachusetts v. Mellon*; *Frothingham v. Mellon*, 262 U.S. 447. While Your Honors have recently decided to review a case involving that principle, this is the state of the law now. Louisiana permits a taxpayer to question public expenditures but no one can do so without alleging his status as a taxpayer which these complainants have not done. They no doubt have standing to insist that there be no segregation on the basis of race or in the schools named in their complaint if those schools are truly public schools because of state action to a prohibited degree, but the federal constitution does not confer upon them standing to question the use of state funds.

D. MISTAKE OF REMEDY

The form of relief sought in this action is borrowed from *Griffin v. County School Board of Prince Edward County*, 377 U.S. 218 (1964). The remedy there was deemed appropriate as a means of forcing the County to reopen public schools which the County had closed despite Court orders, and even when ordered to provide funds for public schools had provided too little for the purpose. The Court's language on this point is succinct:

> "The injunction against paying tuition grants and giving tax credits while public schools remain closed

> is appropriate and necessary since those grants and tax credits have been essential parts of the county's program, successful thus far, to deprive petitioners of the same advantages of a public school education enjoyed by children in every other part of Virginia." 377 U.S. 218, 233.

Not the right to control use of state funds but the right to force the reopening of public schools was the purpose of the injunction in the Prince Edwards case. Here, in Louisiana, the public schools are open and are well supported by Louisiana. Many are integrated and a substantial number have large numbers of children of both races. Tuition grants are available to both races and no application by Negro parents has been rejected. Whatever right the complainants may have to attend the schools under private control, enjoining the state from granting tuitions is not an appropriate action in this case.

F. THE DECISION IN THE PRESENT CASE PREVENTS UNIFORMITY OF TREATMENT OF THIS NATION WIDE PROBLEM WHICH THE CONGRESS BY THE CIVIL RIGHTS ACT OF 1964 INTENDED

No one can gainsay that some state action is involved with respect to private schools in Louisiana. Free textbooks are furnished. The textbooks are related to the courses studied, but there is not a transfer of teachers and students from public schools to private schools en masse as it occurred in Prince Edward's County. The school teachers are not recruited from the public schools. Many come from parochial schools or have retired from the public schools or are only now entering the teaching profession in Louisiana. Free transportation is not provided. Free lunches are not provided. Public buildings are not provided for the owner of the private schools whether operated for profit or on a non-profit basis furnish their own facilities. It has not thus far been held that any

state action at all with respect to a private non-integrated school is repugnant to the 14th amendment to the United States constitution. The United States District Court for the eastern district of Virginia in the 1965 Griffin case held that state action stops with the grant of tuition to the student or his parent, and is not per se such control as to make the conduct of the school state action. *Dartmouth College v. Woodward,* 17 U.S. (4 Wheat) 518 (1819) and *Guillory v. Administrators of Tulane University,* 212 F.Supp. 674 (E.D. of La. 1961).

The Court in the 1965 Griffin case, supra, held:

> "Payment of a tuition grant for use in a private school is legal if it does not tend in a determinative degree to perpetuate segregation. The test is not the policy of the school, but the measure in which the grant or grants contribute to effect the exclusion on account of race. Every exclusive school is not a forbidden school. The part played by the grant in effectuating the exclusion, to repeat, is the pivotal point. It is decisive because the extent of such participation determines whether or not the exclusion is State action—the fundamental question here." 239 F.Supp. 560, 565.
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> * * *
>
> "Private schools are in no wise outlawed by our decision. They have existed for centuries undominated by the State support, and no reason appears why they cannot still flourish without it. Furthermore, as we have already indicated, State grants may within certain limits still be paid for use in private schools although they adhere to a policy of segregation. *Our determination is simply that the preponderant support of a segregated school may not be rooted in State action.*" 239 F.Supp. 560, 566.

In the *Tulane* case, supra, on rehearing the Court noted the undoubted relation of Tulane to the State through the

Tulane Educational Fund by Act 43 of 1884 and by way of tax exemption. The Court said:

> "The question is fundamentally a federal constitutional one, i. e. must the body which operates the Tulane University of Louisiana respond to the constitutional demands of equality of treatment to the citizens of this StSate, nothing more and nothing less. 212 F.Supp. 674, 681.
>
> * * * *
>
> ". . . The law is clear that purely private organizations performing purely private activities may freely associate themselves with a State in such a way as to make that private organization, in its private activity, subject to the Fourteenth Amendment, whether that activity be that of a restaurant, *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 81 S.Ct. 856, 6 L.Ed.2d 45; a golf course, *Hampton v. City of Jacksonville*, 5 Cir., 304 F.2d. 320; a library, *Kerr v. Enoch Pratt Free Library*, 4 Cir., 149 F.2d 212, or in this case a university. With few isolated exceptions, (*Terry v. Adams*, 345 U.S. 461, 73 S. Ct. 809, 97 L.Ed. 1152; *Marsh v. Alabama*, 326 U.S. 501, 66 S.Ct. 276, 90 L.Ed. 265), activities are in themselves neither public nor private. What gives them their constitutional character *is their source of power and control.* This may be solely private, see *Hampton v. City of Jacksonville*, 5 Cir., supra, at 322, of 304 F.2d; *Tonkins v. City of Greensboro*, 4 Cir., 276 F.2d 890, or solely state, *Brown v. Board of Education, supra*, or both private and state, *Burton v. Wilmington Parking Authority, supra.* It is, of course, significant that education, as an activity, when engaged in by a private institution has long been held to be fundamentally private. *Dartmouth College v. Woodward, supra.*" 212 F.Supp. 674, 682, 683.
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> * * *
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> ". . . The cases on state action suggest principles

not rules. Yet this court knows that 'only such action as may *fairly* be said to be that of the State,' *Shelley v. Kraemer,* 334 U.S. 1, 13, 68 S.Ct. 836, 842, 92 L.Ed. 1161 is under the aegis of the Fourteenth Amendment." 212 F.Supp. 674, 683.

* * *

". . . If the flow of state funds to private individuals is state action per se, then in these times the principle of the Civil Rights Cases recently approved and reaffirmed by the Supreme Court in *Burton v. Wilmington Parking Authority* and *Shelley v. Kraemer, supra,* is non-existent. But the recent affirmation of that principle convinces this court that much more than state funds in private hands is necessary for state action.

* * *

". . . Admittedly, when the state is by far the major contributor to the private enterprise, there is state action per se, *Kerr v. Enoch Pratt Free Library of Baltimore,* 4 Cir., 149 F.2d 212." 212 F.Supp. 674, 684.

* * *

None of this seems to us to be altered by the *Lee* decision (*Lee, et al. v. Macon County Board of Education, et al.,* Civil Action No. 604-E, U.S.D.C. Middle District of Alabama.) Again that decision is reached in the light of open opposition of the Governor to the enforcement of desegregation decrees of the Court which led the Court to a conclusion that the Alabama tuition grant law was nothing more than a sham. The Court noted that the defendant state officials had used their power to maintain racially segregated schools—including the power to punish. That case relates to the principles of *Yick Wo v. Hopkins,* 118 U.S. 356, (1886) concerning discriminatory use of a law, not its constitutionality per se, and the *Griffin* case of 1965 is not even mentioned—nor for that matter is *Hawkins vs. North Carolina State Board of Education, et al,*

(W.D. N.C. 2057)—Race Relations Law Reporter 745. To say that there is no rational basis on which to explain the Alabama statute may be valid. The Louisiana statute does not "narrow its focus on an extremely limited class of students—those students whose physical or emotional health would be adversely affected or whose safety might be jeopardized by attending public schools." Such a subjective test invites criticism as did the "interpretation" test in *U. S. v. Louisiana, supra.* On that basis the Court said the Alabama statute is unconstitutional.

In the 1965 *Griffin* case, where, under the Virginia law as under the Louisiana law, no color line is drawn for tuition grants, the Court said:

> ". . . save where the plan is subverted, after the grant has been released, the touch of the State with the child's education in the private school ends. Under the permissible administration of the plan, the mere acceptance of the money by the institution does not transform it into a Virginia instrumentality. 239 F.Supp. 560, 563.
>
> * * *
>
> "Absence of equal protection of the laws is asserted in the contention that there is inequality of enjoyment of the grants. This contention—which is also pressed to destroy the 'freedom of choice' label of the plan—is based on the averment that the Negro has no private school available to him for use of the tuition. The answer is at least two-fold. Initially, there is no proof that private schools are not at hand where the Negro may use the money. Next, such a result would not be the fault of the law; it is an economic, not a constitutional obstruction.
>
> "Over-all, the ultimate and inescapable upshot of the planitiffs' argument is that the State may not provide education except in schools where segregation is

proscribed by law or school policy. Not in logic or in precedent do we find the position upheld. Neither *Griffin v. School Board, supra,* 377 U.S. 218, 84 S.Ct. 126, 12 L.Ed. 2d. 256, nor *Griffin et al. v. Board of Supervisors,* 339 F. 2d. 486 (4 Cir. 1964) points that way. Decision in each instance was strictly confined to the circumstances peculiar to Prince Edward County and Surry County. Quite clearly, the Courts ventured no expression upon the universal validity of the Virginia tuition law." 239 F.Supp. 560, 564.

The Louisiana statute shows greater distance from state action, with respect to private schools, tha ndoes the Virginia statute. For in Virginia, the State Board of Education regulates the application of the grant-in-aid and the teachers in schools whose pupils receive grants are covered by the state pension plan for all teachers. Not so in Louisiana.

The distinction between a valid state law, such as ours, and an invalid one is pointed out clearly in *Hawkins.* The Court of three judges said:

". . . The case of *Griffin v. State Board,* 239 F. Supp. 560 (1965), is not apposite *for there the tuition grants were available to anyone without distinction as to reason for not wanting to attend a public school.*

* * *

"The Virginia three-judge district court stated: 'Obpiously, no distinction in eligibility is here made on account of race.' Id. at 563. Under the North Carolina statute a determination of race must be made, a student is not eligible unless a child of another race attends his assigned school *and* there is no other convenient segregated school for him to attend. §115-275. This is *contrasted* to the Virginia legislation where a student *could* receive the same grant even if he were assigned to a *segregated* public school initially."

Your Honors will observe, as did the Virginia Court in the 1965 Griffin case, that its ruling is in harmony with the Congressional definition of a public school in the Civil Rights Act of 1964 which is as follows:

> "(c) 'Public school' means any elementary or secondary educational institution, and 'public college' means any institution of higher education or any technical or vocational school above the secondary school level, provided that such public school or public college is operated by a State, subdivision of a State, or governmental agency within a State, or operated wholly or *predominantly* from or through the use of governmental funds or property, or funds or property derived from any governmental source." §401(c), 42 USCA §2000c(c).

"Predominant" means having ascendancy over others; superior, as in strength. (Webster). We have not found that any other meaning was given to the words by Congress.

Congress enacted this law for all of the United States. This represents the thought of the legislative branch of our government after consideration of all related problems and interests and not just the views of particular litigants. As it is designed for nationwide use it should be applied as written. In the interest of good order, different rules and different formulas should not be sought in the many cases presented to this Court.

This Court acted on general principles in *Brown* to forbid state enforced segregation. The Court did not command state enforced integration. Especially did the Court not consider the extent of state action which would require integration. *Congress has done so.* Predominant support has been made the test. This Court has consistently made it clear that where Congress acts within its authority this Court will not

substitute its judgment for that of the legislature. Your predecessors have said:

> "It is not the function of a court to determine whether the public policy that finds expression in Legislation of this order is well conceived * * *. Within the field where men may reasonably differ, the Legislature must have its way." *Williams v. Mayor and City Council of Baltimore*, 289 U.S. 36, 42.

The rule is even stronger when the Congress is concerned. The injunction granted is not consistent with the public policy stated by Congress. We believe the District Court for the Eastern District of Louisiana erred in rejecting the Congressional view and the view of the United States District Court for the Eastern District of Virginia and the Western District of North Carolina.

CONCLUSION

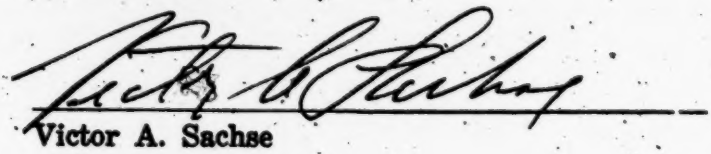
It is respectfully submitted that this Court has jurisdiction of this appeal under Sec. 1253, Title 28, United States Code; that the questions presented are so substantial as to require plenary consideration under Rule 15, 1(f) of the rules of this Court; and that the Court below abused its discretion by granting the injunction sought by complainants.

Respectfully submitted,

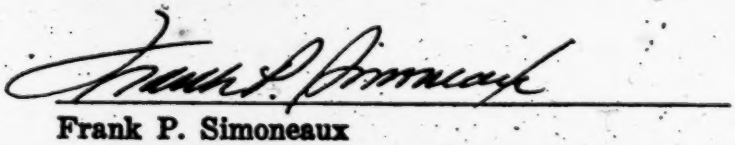
J. J. Davidson, Jr.

Sidney W. Provensal, Jr.

C. C. Wood



Victor A. Sachse



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CERTIFICATE OF SERVICE

I, Victor A. Sachse, one of the Attorneys for the Louisiana Financial Assistance Commission, its officers and members, appellants, herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 3rd day of November, 1967, I served copies of the foregoing Jurisdictional Statement to the Supreme Court of the United States on the several parties thereto; as follows:

1) On Bryan Poindexter, a minor, by Lorraine Poindexter, his mother and next friend; Alfred Louis Larks, a minor, by Charles Larks and Cora Lee Larks, his parents and next friends; Anthony Jarrow, a minor, by Peter Jarrow and Ruby Jarrow, his parents and next friends; on behalf of themselves and other Negro Children and their parents similarly situated, by air-mailing a copy thereof to A. P. Tureaud and A. M. Trudeau, Esqs., 1821 Orleans Avenue, New Orleans, Louisiana, 70116 and Jack Greenberg, Charles H. Jones, Jr., and Henry Aaronson, Esqs., 10 Columbus Circle, New York, New York.

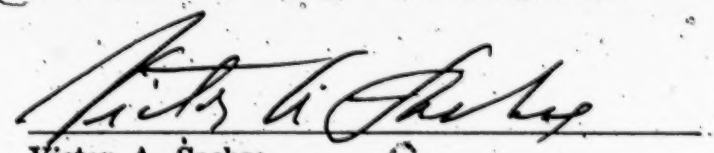
2) On the United States, a plaintiff-intervenor, by air mailing copies thereof to Louis Lacour, Esq., United States Attorney for the Eastern District of Louisiana, at 400 Royal Street, New Orleans, Louisiana, Hugh W. Fleischer, Esq., United States Department of Justice, 1723 Masonic Building, New Orleans, Louisiana and the Solicitor General, Department of Justice, Washington 25, D. C.

3) On Mrs. Thelma Deamer, Carroll Leach, Rosetta Jiles and Mrs. Fannie Magee, defendant-intervenors, by air mailing copies thereof to Cy Courtney, Esq., National Bank of Commerce Building, New Orleans, Louisiana 70112, and Richard Cadwallader, Esq., Louisiana National Bank Building, Baton Rouge, Louisiana.

4) On Garden District Academy, defendants, by air mailing copies thereof to Sydney J. Parlongue, Esq., National Bank of Commerce Building, New Orleans, Louisiana 70112.

5) On Ninth Ward Elementary School and Armond J. Duvio, and Carrollton Elementary School Association, defendants, by air mailing copies thereof to Walter E. Doone, Esq., Room 205, Southern Marine and Aviation Building, New Orleans, Louisiana 70112.

6) On Louisiana State Board of Educaaion, defendant, by mailing copies thereof to Frank L. Dobson, Esq., Attorney General's Office, Capitol Building, Baton Rouge, Louisiana.



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APPENDIX

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 793

LOUISIANA FINANCIAL ASSISTANCE COMMISSION: E. W. Gravolet, Jr., James R. Leake, James D. Fountain, and Lantz Womack, officers and members of the Louisiana Financial Assistance Commission, et al

Appellants

v.

BRYAN POINDEXTER, a minor, by LORRAINE POINDEXTER, his mother and next friend; ALFRED LOUIS LARKS, a minor, by CHARLES LARKS and CORA LEE LARKS, his parents and next friends; ANTHONY JARROW, a minor, by PETER JARROW and RUBY JARROW, his parents and next friends; on behalf of themselves and other Negro children and their parents similarly situated,

Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

CIVIL ACTION
NO. 14683

BRYAN POINDEXTER, a minor, by LORRAINE POINDEXTER, his mother and next friend; ALFRED LOUIS LARKS, a minor, by CHARLES LARKS and CORA LEE LARKS, his parents and next friends; ANTHONY JARROW, a minor, by PETER JARROW and RUBY JARROW, his parents and next friends; on behalf of themselves and other Negro children and their parents similarly situated,

Plaintiffs,

v.

LOUISIANA FINANCIAL ASSISTANCE COMMISSION; E. W. Gravolet, Jr., James R. Leake, James D. Fountain, and Lantz Womack, officers and members of the Louisiana Financial Assistance Commission; LOUISIANA STATE BOARD OF EDUCATION, Nash C. Roberts, Jr., Jack Fruge, Enoch T. Nix, Joseph J. Davies, Jr., J. Marshall Brown, Leon Gary, Robert H. Curry, W. E. Whetstone, Boyd M. Woodard, President, Members of the State Board of Education; William J. Dodd, Secretary and Executive Officer of the State Board of Education and State Superintendent of Public Education; ORLEANS PARISH SCHOOL BOARD; Lloyd J. Rittiner, President, Daniel A. Ellis, Louis G. Riecke, Matthew R. Sutherland, Theodore H. Shepard, Jr., Members of the Orleans Parish School Board and O. Perry Walker, Superintendent of the Orleans Parish School Board; NINTH WARD ELEMENTARY SCHOOL, Armand J. Duvio, Director; CARROLLTON ELEMENTARY SCHOOL ASSOCIATION; and GARDEN DISTRICT ACADEMY,

Defendants.

A. P. Tureaux, Esq.
Ernest Morial, Esq.
A. M. Trudeau, Jr., Esq.
Charles H. Jones, Jr., Esq. — Attorneys for Plaintiffs

James E. Phillips, Jr., Esq. — Attorneys for Louisiana State Board of Education

Frank L. Dobson, Esq. — Attorney for St. Paul School
Samuel I. Rosenberg, Esq. — Attorney for Orleans Parish School Board

Victor A. Sachse, Eeq.
C. C. Wood, Esq.
Frank P. Simoneaux, Esq.
Robert Brumby, Esq. — Attorneys for Louisiana Financial Assistance Commission

Before WISDOM, Circuit Judge, CHRISTENBERRY and AINSWORTH, District Judges.

WISDOM, Circuit Judge:

The plaintiffs attack the constitutionality of the Louisiana legislature's second attempt to use tuition grants to support so-called "private" schools for white children fleeing from desegregated public schools. On the first occasion this Court, observing "this is not the moment in history for a state to experiment with ignorance," held that the grant-in-aid program ran afoul of the equal protection clause. Hall v. St. Helena Parish School Board, E.D.La. 1961, 197 F.Supp. 649, *aff'd per curiam*, 1962, 368 U.S. 515, 82 S.Ct. 529, 7 L.Ed. 2d 521.

The plaintiffs, Negro public school children in New Orleans and their parents, bring this class action under the Civil Rights Act of 1871, 42 U.S. §§ 1981, 1983, and under 28 U.S.C. § 1343(3). A three-judge court was convened under 28 U.S.C. § 2281.

The theory of the complaint is that private schools largely supported by state grants are in reality a segregated public school system. The complaint asserts that this system is "only a continuation of the original scheme of, and a part of the public school system, designed and administered to maintain and perpetuate the separation of pupils by race and color." The Negro children allege that tuition grants are unavailable

to them unless they attend segregated private schools; they were refused admission to three schools allegedly because of their race. This imposes upon them, they say, an unconstitutional condition. They have a choice of refusing tuition grants or accepting them for use within a segregated system.

The plaintiffs ask the court to enjoin[1] (1) the Louisiana Financial Assistance Commission and its members, (2) the Louisiana State Board of Education and its members, (3) the State Superintendent of Public Education, (4) the Orleans Parish School Board and its members, and (5) the Superintendent of the Orleans Parish School Board from the "enforcement, operation, and execution" of the tuition grant program as long as Negroes are excluded from subsidized schools on the basis of race or color. The complaint also named as defendants the Ninth Ward Elementary School, Armand J. Davio, Director, the Carrollton Elementary School, and the Garden District Academy, the New Orleans schools which allegedly denied the plaintiffs admission because of their race. On motion of the plaintiffs, the court dismissed these parties from the suit as parties-defendant.

The defendants move for dismissal on the ground that the plaintiffs lack standing to challenge the constitutionality of the tuition grant program. In addition, the defendants contend that the case does not require a three-judge court since the complaint asks the court to enjoin only the unconstitutional application of the tuition grant statute and does not seek to have the statute itself declared unconstitutional. The Louisiana State Board of Education and the Orleans Parish School Board move for dismissal of the suit as to them on the ground that they have no connection with the tuition grant program. The Louisiana Financial Assistance Commission joins in their motion that the school boards be dismissed from the suit. We deny the defendants' motions.

Act 147 of 1962 (LSA-R.S. 17-2959) establishes a system of State tuition grants for children attending private non-

sectarian elementary or secondary schools in Louisiana[2]. The statute creates the Louisiana Financial Assistance Commission to administer the program. The Commission makes tuition grants from state funds directly to children attending the private schools or to their parents—but only if the school accepts the children. The applicants must furnish satisfactory evidence of admissibility to a private non-sectarian school *"legally constituted and operated under the constitution and laws of the state."* L.R.S. §§ 17:2955A(2) (a) and (c) (1963). The state allegedly pays $360 to each student attending private schools—but allocates *only $257 a year for each student attending a public school in Orleans Parish.* The 1962 financial assistance act authorized $200,000 a month for the program;[3] in 1963 the legislature increased this amount to $300,000 a month. The Commission has the power to prescribe qualifications for financial assistance, with certain limitations[4]. The statute is tied in with the public school system, in the sense that it requires that applicants must "be eligible . . . for admission to elementary or secondary schools *within the public school system of the State of Louisiana."*

The tuition grant program under attack is a refined, sophisticated substitute for the earlier grant-in-aid program, held unconstitutional in *Hall vs. St. Helena Parish School Board.* The 1958 scheme was blatantly discriminatory state action: grants were available to parents and private schools only "where no racially segregated public school" was provided. In 1960 the Louisiana legislature erased the *express* statutory racial restrictions, but preserved the substance of the program, including provisions for closing the public schools. The 1960 changes did not cure the constitutional vice: If the state was not "doing business at the old stand . . . [it was] participating as the senior, and not silent, partner in the same sort of business. The continuance of segregation at *the state's public-private schools,* therefore, *is a violation of the equal protection clause."* 197 F. Supp. at 655.

Act 147 of 1962 does away with provisions for closing public schools, transfers administration of the grant-in-aid program from the State Board of Education to the ~~Financial~~ Assistance Commission, and provides for grants to be made to the students and parents rather than directly to the private schools. Accordingly, the defendants contend that the statute is essentially different from the earlier statutes considered by this court; that it represents legislative acceptance of the decisions of this court and of the United States Supreme Court. The legislative theory of the law is that state aid to the school child is not aid to the school. Borden vs. Louisiana State Board of Education, 1929, 168 La. 1005, 123 So. 655, *aff'd sub nom.* Cochran vs. Louisiana State Board of Education, 1930, 281 U.S. 370, 50 S.Ct. 335, 74 L.Ed. 913; Everson vs. Board of Education of Ewing Township, 1947, 330 U.S. 1, 67 S.Ct. 504, 91 L.Ed. 711.

II.

The defendants' motion to dismiss the action for lack of standing rests on their analysis of the complaint as asserting only a state claim that belongs, if it belongs anywhere, in state courts. See *Borden vs. Louisiana State Board of Education.* As the defendants view it, the controversy is only over the disbursement of public funds for tuition. In support of their contention they point to the fact that the plaintiffs do not attack Act 147 as unconstitutional on its face. They point out, too, that the plaintiffs do not ask the court to integrate or to close the private schools which accept students receiving grants. In short, so the defendants say, the plaintiffs' suit is nothing more than a taxpayer's suit to enjoin the state's unlawful expenditure of public funds for private purposes. Snowden vs. Hughes, 1944, 321 U.S. 1, 6, 64 S.Ct. 397, 88 L.Ed. 497, 501; Dinwiddie vs. Brown, 5 Cir. 1956, 230 F.2d 465; Hanna vs. Home Insurance Company, 5 Cir. 1960, 281 F.2d 298.

The defendants' argument rests on a misunderstanding of the nature of the plaintiffs' rights. The plaintiffs are not suing as Louisiana taxpayers objecting to the legislature's violation of the State Constitution. They assert federal rights protected by the United States Constitution. As the plaintiffs couch their complaint, they are concerned only indirectly with the unlawful disbursement of state funds; their direct concern is that the state has established what in effect is a second state school system, one that is segregated. As the plaintiffs assert in their complaint, the grant-in-aid program "was created and is presently being administered as a scheme to allow pupils to avoid attending desegregated schools and to assist in the maintenance of a separate, racially segregated school system." The grants, as the plaintiffs contend, *are a conduit between the state and the schools,* the instrument for establishing and maintaining a second state system of schools. "[A] court would find it hard to ignore the fact that the effect of this [tuition grant system] in the South would be a public school system for Negroes and private schools for white children at state expense . . . If the purpose or effect of state aid to private schools is the maintenance of segregation, then the plan will be declared state action." Jansen, Private and State Action in School Segregation, 11 Loyola L.Rev. 92, 96 (1962).

State financial aid to private schools cannot be isolated from the context in which it is given. Here the disbursement of the funds is relevant for several reasons. First, the state's payment of tuition grants is state action. Second, the stimulus of the funds in the founding of quasi-public schools and the use of the funds in the support of the schools bear on the question whether the schools should be treated as part of a state system of public or quasi-public schools. Third, an injunction against the disbursement of tuition grants is a reasonable and appropriate equitable remedy, should the court find that the system, as operated, is unconstitutional. Finally, we take judicial notice of the Civil Rights Act of 1964, 78 Stat. 241,

42 U.S.C. § 1971. This Act directs the Attorney General, on complaint that children have been denied admission to a public school by reason of race or color, "to initiate and maintain appropriate legal proceedings to achieve desegregation of the school. 42 U.S.C. § 2000c-6(a). The statute defines a *"public school"* as follows:

> "(c) 'Public school' means any elementary or secondary educational institution, and 'public college' means any institution of higher education or any technical or vocational school above the secondary school level, provided that such public school or public college is operated by a State, subdivision of a State, or governmental agency within a State, or *operated wholly or predominantly from or through the use of governmental funds* or property, or funds or property derived from a governmental source." § 401(c), 42 U.S.C.A. § 2000c(c).

If the allegations in the complaint are found to be true, *all the so-called "private schools" in Louisiana operated "predominantly" with state tuition grants" are, by definition, "public schools."*

There is a due process argument that public funds derived, at least in some part, from taxes paid by the plaintiff should not be appropriated to non-public purposes in deprivation of the plaintiffs' right to a desegregated state school system. A state appropriation to effect an unconstitutional purpose is a taking of property for a purpose not "public" within the requirement of the due process clause. The plaintiffs, however, emphasize the equal protection clause as justifying their standing to sue. The state-supported "white" private schools deny them admission on the ground of race. Beyond that, so the plaintiffs argue, the very existence of a second and quasi-public school system endangers bona fide public schools and damages Negro pupils. It damages public schools by draining teachers, students, and funds into a competitive system. It tends to dilute the right of Negro children

to attend integrated schools. *It puts the stamp of state approval on he stigma of Negro inferiority, perpetuating the humiliation of Negroes implicit in segregated education. That, in substance, is the basis for the plaintiffs' suit.*

In Griffin v. State Board of Education, E.D.Va. 1965, 239 F. Supp. 560, Negro pupils and their parents attacked the Virginia system of tuition grants. The system is similar to Louisiana's. The Court rejected the argument that grants were aid only to the students, not to the schools. The Court adopted the same rule of thumb the Civil Rights Act adopted in determining what is a "public school:

> "[I]f the private school is the creature of, or is preponderantly maintained by, the grants, then the operation of the school is State action, and payment of the grants therefor is a circumvention of the equal protection clause of the Constitution . . . Thus, the State is nurturing segregated schools." 239 F. Supp. at 565.

On the question of standing, the court held:

> "Plaintiffs are Negro pupils and parents whose capacity and standing to sue, as presently, for vindication of rights secured by the equal protection and due process clauses of the Fourteenth Amendment are indisputable." 239 F. Supp. at 562.

Similarly, in Lee v. Macon County Board of Education, M.D.Ala. 1964, 231 F.Supp. 743, the court held that "the use the grant-in-aid statutes by the State of Alabama through the payment of tuition grants for students enrolled in schools that discriminate upon the basis of race or color is unconstitutional." 231 F.Supp. at 754. The court enjoined the Governor of Alabama, the State Superintendent of Education, the State Board of Education and its members from interfering with the county and city boards of education in desegregation throughout the State of Alabama. As in *Griffin* and in the instant case, Negro school-children and their parents brought the action.

The Civil Rights Act of 1964 adopts the rule of thumb that a school supported "predominantly" by the state grants should be treated as a "public school". Griffin too adopts this rule. A segregated school predominantly supported by state funds is an *a fortiori* case of unconstitutional state action. But any amount of state support to help found segregated schools or to help maintain such schools is sufficient to give standing to Negro school children to file the kind of complaint filed in this case.

In Cooper v. Aaron, 1958, 358 U.S. 1, 4, 78 S.Ct. 1041, 3 L.Ed.2d 5, the Supreme Court said:

> "State support of segregated schools through any arrangement, management, funds, or property cannot be squared with the [Fourteenth] Amendment's command that no State shall deny to any person within its jurisdiction the equal protection of the laws."

In Simkins v. Moses, H. Cone Memorial Hospital, 4 Cir. 1963, 323 F.2d 959, *cert. denied*, 1964, 376 U.S. 938, the Fourth Circuit held that a hospital's policy of racial exclusion was state action within the Fifth and Fourteenth prohibitions against racial discrimination. Under the Hill-Burton Act the hospital had received from the Government seventeen per cent of the cost of two recent additions. And in Burton v. Wilmington Parking Authority, 1961, 365 U.S. 715, 722, 81 S.Ct. 856, 6 L.Ed.2d 45, the Supreme Court repeated the "broad test" in *Sooper v. Aaron* that "state responsibility ... necessarily follow[s] upon 'any state participation through any arrangement, management, funds or property'." *Burton v. Wilmington Parking Authority* indicates that the required degree of control by the state is slight. 365 U.S. at 723. A parking authority had constructed a public parking facility in which space was rented to a private "white" restaurant. The Supreme Court held that the parking authority, as landlord, exercised the requisite financial assistance and control to constitute state action. "Only by sifting facts and weighing

circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance." See also Jansen, Private and State Action in School Segregation, 11 Loyola L.Rev. 92, 96 (1962); Comment, Public Control of Private Sectarian Institutions Receiving Public Funds, 63 Mich. L.Rev. 142 (1964); Note, 79 Harv.L.Rev. 841 (1966).

We hold that the plaintiffs have standing to sue, and to probe "the purpose, mechanics, and effect of the plan" in light of present constitutional standards. Hall v. St. Helena Parish School Board, 197 F.Supp. at 652. As we said in our examination of the earlier Louisiana grant-in-aid system:

> "Irrespective of the express terms of a statute, particularly in the area of racial discrimination, courts must determine its purpose as well as its substance and effect . . . '[A]cts generally lawful may become unlawful when done to accomplish an unlawful end.' Western Union Tel. Co. v. Foster, 247 U.S. 105, 114, 38 S.Ct. 438, 62 L.Ed. 1006." *Ibid.*

See also Gomillion v. Lightfoot, 1960, U.S. 3—, 81 S.Ct. 125, 4 L.Ed.2d 110; United States v. Louisiana, E.D.La. 1963, 225 F.Supp. 353, aff'd 380 U.S. 145, 85 S.Ct. 817, 13 L.Ed.2d 709.

Nothing said in this opinion should be taken as an expression of the court's views on the merits or as justifying the filing of a motion for summary judgment. This case should be decided after a full trial on the facts. The extent to which the tuition grants contributed to the founding of the quasi-public schools, in dollars and as a stimulus, the extent to which the grants now contribute to the support of the quasi-public schools, the extent of state involvement and control, and other factors relevant to state action can be determined only by a trial on the merits.

III.

The convening of a three-judge court is proper in this case. 28 U.S.C. § 2281. Section 2281 specifies that this special court is necessary if the plaintiffs seek to restrain the "en-

forcement, execution, or operation" of a state "statute" or an "order" of a state administrative board or commission. The plaintiffs ask the court to enjoin the defendants and state officers from "enforcing" the legislative program as administered or as operated under certain Louisiana statutes. A "petition for injunction on the ground of the unconstitutionality of a statute *as applied* . . . requires a three-judge court." Ex parte Bransford, 1940, 310 U.S. 354, 361, 60 S.Ct. 947, 84 L.Ed. 1249. Here the complaint does not just seek to restrain unlawful executive action; here the legislative policy is under attack: "The crux of the business [use of a three-judge court] is procedural protection against an improvident state-wide doom by a federal court of a legislative policy. This was the aim of Congress and is the reconciling principle of the cases." Phillips v. United States, 1941, 312 U.S. 246, 251, 61 S.Ct. 480, 85 L.Ed. 800. See Hall v. St. Helena, 197 F. Supp. at 658-9 in which a three-judge court enjoined the closing of schools under the earlier statute giving local school boards the authority to suspend or close public schools. See also Herkness v. Irion, 1928, 278 U.S. 92, 49 S.Ct. 40, 73 L.Ed. 198 in which the Supreme Court rejected the district court's distinction between an allegation of unconstitutional action on the part of state officers as opposed to allegation of the unconstitutionality of the statute under which they acted.

The constitutional contention is substantial. The plaintiffs need not conclusively demonstrate in the complaint the unconstitutionality of the statutes or their application in the complaint. "For jurisdictional purposes it suffices that a substantial claim of deprivation has been made." Bush v. Orleans Parish School Board, E.D.La. 1960, 188 F.Supp. 916, 922.

IV.

The Louisiana State Board of Education and the Orleans Parish School Board move for dismissal of the complaint as to them on the ground of misjoinder. Fed.R.Civ.Proc., Rules

12(b)(2), 21. These defendants assert that they have nothing whatever to do with the administration of the tuition grant program. They concede that they have statutory responsibility for administering public schools; they disclaim any connection with the administration or payment of tuition grants to private schools under the 1962 financial assistance laws.

The test for permissive joinder of parties is stated in Rule. 20(a) of the Federal Rules of Civil Procedure[5]. The "same transaction" and "common question" tests must both be met for joinder to be proper. 2 Barron & Holtzoff, Federal Practice and Procedure § 533, at p. 184 (Wright ed. 1961). In this case, the plaintiffs allege that the school boards, as well as the Financial Assistance Commission, are involved in "contniuing to enforce the policy, practice, custom, and usage of supporting and maintaining a separate segregated school system . . ." Therefore, say the plaintiffs, the school boards are at least proper parties to a suit testing the constitutionality of the statutes authorizing the present grant-in-aid system.

The school boards assert that they have no direct connection with the current grant-in-aid program. The state constitution now distinguishes between "free public schools" and "financial assistance directly to school children of the state for attendance at private non-sectarian elementary and secondary schools." La. Const. Art. 12, §§ 1, 6 (1921), as amended (1962). The constitution vests the State Board of Education with responsibility only for "supervision and control of all free public schools." *Id.* § 6. The Orleans Parish School Board has "power, control, and administration" of only public education. See Orleans Parish School Board v. City of New Orleans. La.App. 1952, 56 So. 2d 280, 284.

The Louisiana legislature's attempt to fragment the function of the State Board of Education does not defeat the responsibility of the Board under the Louisiana Constitution

for a comprehensive program for public education. For jurisdictional purposes, it is entirely proper to consider the interrelated activities of all state agencies with their primary responsibility for public education. As we said in Hall v. St. Helena Parish School Board:

> "The equal protection clause speaks to the state. The United States Constitution recognizes no governing unit except the federal government and the state. A contrary position would allow a state to evade its constitutional responsibility by carve-outs of small units. At least in the area of declared constitutional rights, and specifically with respect to education, the state can no more delegate to its subdivisions a power to discriminate than it can itself directly establish inequalities. When a parish wants to lock its school doors; the state must turn the key. If the rules were otherwise, the great guarantee of the equal protection clause would be meaningless." 197 F.Supp. at 658.

No state or combination of state agencies "may effectively abdicate its responsibilities by either ignoring them or by merely failing to discharge them whatever the motive may be." Burton v. Wilmington Parking Authority, 365 U.S. at 725, 81 S.Ct. at 861, 6 L.Ed.2d at 52; Hall v. St. Helena Parish School Board, 197 F.Supp. at 658.

Specific provisions of the Louisiana constitution and statutes also contradict the boards' assertion that they have "nothing whatsoever to do with the statutes complained of in the instant litigation." The financial assistance act requires as a condition for tuition grants that applicants "furnish satisfactory evidence of admissibility to a private . . . school, legally constituted and operated under the constitution and laws of the state." LSA - R.S. 17:2955A(2)(c) (1963). Under the Louisiana Constitution, it is the State Board of Education that has the "authority to approve private schools and colleges." La. Const. Art. 12, § 7; LSA - R.S. 17:411 (1963).

Parish school boards have broad statutory responsibility to "see that the provisions of the state school laws are complied with" and to assure adequate funds for schools of the parish[8].

During the trial the boards may satisfy the court that their involvement in the program is too insignificant to warrant their inclusion in a decree. "Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action . . ." Fed. R. Civ. Proc., Rule 21. At this point, however, we consider the school boards properly joined as defendants in the case. *Cf.* United States v. Mississippi, 1965, 380 U.S. 125, 85 S.Ct. 808, 13 L.Ed.2d 717; *Griffin v. State Board of Education;* James v. Almond, E.D.Va. 1959, 170 F.Supp. 331.

V

On reflection, we have concluded that the *Ninth Ward* Elementary School, the *Carrollton Elementary* School, and the *Garden District Academy* should not be dismissed from this suit on the plaintiffs' motion. These schools are not necessary parties, as far as the constitutionality of the tuition grant system is concerned. However, they have a *clear-cut interest* in any decision affecting their right to admit students receiving tuition grants. Moreover, the state risks contradictory decisions, if one of these schools or its students should sue for payment of the grants on the ground that the school in question does not practice segregation or receives insubstantial state support. Accordingly we vacate our order dismissing the three schools from this action and reinstate them as parties-defendant. See Fed. R. Cic. Proc. 21, 41 (b); Rekeweg v. Federal Mutual Assistance Co., N.D. Ind. 1961, 27 F.R.D. 431, 435.

VI.

The objections of the defendants to the plaintiffs' interrogatories and requests for admissions are specious. The de-

fendants are directed to answer the interrogatories and requests for admission within fifteen days of the date of this opinion-order.

DATED: August 3, 1966.

/s/ *John Minor Wisdom*
United States Circuit Judge
/s/ *Herbert W. Christenberry*
United States District Judge
/s/ *Robert A. Ainsworth*
United States District Judge

BRYAN POINDEXTER, et al. v.
LOUISIANA FINANCIAL ASSISTANCE COMMISSION, et al.
C. A. No. 14683

FOOTNOTES

1 The prayer of the complaint asks the court to enjoin the defendants from: "a) continuing to enforce, operate, or execute certain statutes of the State of Louisiana providing for the disbursement of funds in the form of tuition grants, or grants-in-aid, which were enacted, and art presently administered, to maintain a separate segregated school system, such statutes being §§17:2951—2959 of the Louisiana Revised Statutes, and any othtr statutes of the State of Louisiana similarly tnforcing or permitting such segregation. b) continuing to enforce the policy, practice, custom, and usage of supporting and maintaining a seperate segregated school system, by making payments of tuition grants, or, grants-in-aid, or disbursing, or in any way administering, monies to be made available to pupils, or their partnts or guardians, for attendance at schools which exclude from their enrollment any students, otherwise eligible for said payments, on the basis of race or color."

2 Act 10, 2nd Extraordinary Session of 1961, LSA - R.S. 47:318, as amtnded, supported by sales tax dedication to a fund administered by the Commission.

3 Among the powers enumerated in L.R.S. §17:2955 are the following:

B. To prescribe standards . . . for qualification for such financial assistance, which standards shall be as follows:

Applicants must:

* * *

(3) Furnish satisfactory evidence of admissibility to a private non-sectarian elementary or secondary school in this state, legally constituted and operated under the Constitution and laws of the State of Louisiana.

* * *

D. To determine and pay the amount of the financial assistance to be made available to each applicant . . .

E. To prescribe standard forms of applications and related documentary evidence for financial assistance . . .

* * *

G. Upon approving the application for financial assistance the Commision shall issue its commitment in writing to the parent or guardian of, or person standing in loco parentis to, the applicant . . .

* * *

I. All payments made in accordance with any commitment issued by the Commission shall be by check to the parent or guardian of, or the person standing in loco parentis to, the applicant. The private nonsectarian elementary or secondary school attended shall furnish, upon forms prescribed by the Commission, as often as the Commission shall require it, sworn certificates, signed by the director or other appropriate official of said elementary or secondary school, showing the number of days actually attended by the applicant, and assigning reasons for any reported absences.

4 LSA - R.S. 17:2906-16, repealed by Act 147 of 1962, § 11.

5 "(a) Permissive Joinder. All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action. All persons (and any vessel, cargo or other property subject to admiralty process in rem) may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action. A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief, and against one or more defendants according to their respective liabilities. As amended Feb. 28, 1966, eff. July 1, 1966."

6 LSA - R.S. 81 (1963): *"General powers of board"*

Each parish school board * * * shall see that the provisions of the state school laws are complied with. * * *

Each school board shall exercise proper vigilance in securing for the support of the *schools of the parish* all funds destined for the support of the schools, including the state funds apportioned thereto, *and all other funds.* * * * (Emphasis added.)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

CIVIL ACTION
NO. 14683

BRYAN POINDEXTER, a minor, by LORRAINE POINDEXTER, his mother and next friend; ALFRED LOUIS LARKS, a minor, by CHARLES LARKS and CORA LEE LARKS, his parents and next friends; ANTHONY JARROW, a minor, by PETER JARROW and RUBY JARROW, his parents and next friends; on behalf of themselves and other Negro children and their parents similarly situated,

Plaintiffs,

v.

LOUISIANA FINANCIAL ASSISTANCE COMMISSION; E. W. Gravolet, Jr., James R. Leake, James D. Fountain, and Lantz Womack, officers and members of the Louisiana Financial Assistance Commission; LOUISIANA STATE BOARD OF EDUCATION, Nash C. Roberts, Jr., Jack Fruge, Enoch T. Nix, Joseph J. Davies, Jr., J. Marshall Brown, Leon Gary, Robert H. Curry, W. E. Whetstone, Boyd M. Woodard, President, Members of the State Board of Education; William J. Dodd, Secretary and Executive Officer of the State Board of Education and State Superintendent of Public Education; ORLEANS PARISH SCHOOL BOARD; Lloyd J. Rittiner, President, Daniel A. Ellis, Louis G. Riecke, Matthew R. Sutherland, Theodore H. Shepard, Jr., Members of the Orleans Parish School Board and O. Perry Walker, Superintendent of the Orleans Parish School Board; NINTH WARD ELEMENTARY SCHOOL, Armand J. Duvio, Director; CARROLLTON ELEMENTARY SCHOOL ASSOCIATION; and GARDEN DISTRICT ACADEMY,

Defendants.

A. P. Tureaud,
A. M. Trudeau,
Jack Greenberg
Henry M. Aronson, for the Plaintiffs

Hugh W. Fleischer,
Ray Terry,
J. Harold Flannery, - U.S. Dept. of Justice - Plaintiff-Intervenor

Victor A. Sachse,
J. J. Davison,
Sidney W. Provensal, - for La. Financial Assistance Comm., E. W. Gravolet, Jr., Jas. R. Leake, Jas. D. Fontain, and Lantz Womack

Cy Courtney,
Richard Cadwallader, - on Mrs. Thelma Deamer, Carroll Leach, Rosetta Jiles and Mrs. Fannie Magee, Defendant-Intervenors

Sydney J. Parlongue, - for Garden District Academy

Walter E. Doane, - on Ninth Ward Elementary School and Armond J. Duvio, and Carrollton Elementary School Association, defendants

Frank L. Dobson, - on Louisiana State Board of Education, defendant

Before WISDOM and AINSWORTH, Circuit Judges and CHRISTENBERRY, District Judge.

WISDOM, Circuit Judge:

This class action by Negro schoolchildren and their parents against the Louisiana Financial Assistance Commission and others[1] attacks the constitutionality of Act 147 of 1962[2]. Under that law the Commission administers a program of tuition grants to pupils attending private schools in Louisiana. The United States intervened as a party plaintiff[3]; directors of four private schools for Negro retarded children intervened as parties defendant[4].

In an earlier opinion in this case the court disposed of various motions, including the defendants' motion to dismiss for lack of the plaintiffs' standing to sue and a motion to dissolve the three-judge court. Poindexter v. Louisiana Financial

Assistance Commission, E.D. La. 1966, 258 F. Supp. 458. The matter is now before us on the merits[6].

* * *

The free lunches and textbooks Louisiana provides for all its schoolchildren are the fruits of racially neutral benevolence. Tuition grants are not the products of such a policy. They are the fruits of the State's traditional racially biased policy of providing segregated schools for white pupils. Here that policy has pushed the State to the extreme of using public funds to aid private discrimination endangering the public school system and equal educational opportunities for Negroes in Louisiana.

As certainly as "12" is the next number of a series starting 2, 4, 6, 8, 10, Act 147 fitted into the long series of statutes the Louisiana legislature enacted for over a hundred years to maintain segregated schools for white children[6]. After the Supreme Court's 1954 decision in the School Segregation Cases[7], the legislature rapidly expanded the series. As fast as the courts knocked out one school law, the legislature enacted another. Each of these laws, whether its objective was obvious[8] or non-obvious, was designed to provide a state-supported sanctuary for white children in flight from desegregated public schools.

Act 147 of 1962 is unconstitutional. The purpose and natural or reasonable effect of this law are to continue segregated education in Louisiana by providing state funds for the establishment and support of segregated, privately operated schools for white children. The United States Constitution does not permit the State to perform acts indirectly through private persons which it is forbidden to do directly. The evidence before the Court shows that the tuition grants have supplied a heavy predominance of funds needed to establish and maintain post-1954 and especially post-1962 private segregated schools. The Commission's recent decision to reduce

its aid to less than 50 per cent of the funds required for operating a school fails to take the curse off the Act. Any affirmative and purposeful state aid promoting private discrimination violates the equal protection clause. There is no such thing as the State's being just a little bit discriminatory.

I.

The Statute

Act 147 of 1962 (LSA-R.S. 17:2951-17:2959) authorizes state tuition grants for children attending "private non-sectarian elementary or secondary schools" in Louisiana. The statute creates the Louisiana Financial Assistance Commission to administer the program. The Commission is composed of three members appointed by the governor[9]. Payments are "by check to the parent or guardian of, or the person standing in loco parentis to, the applicant." The statute is tied in with the public school system in the sense that to receive a grant, the applicants must be "eligible . . . for admission to elementary or secondary schools within the public school system of the state." Applicants must furnish "satisfactory evidence of admissibility to a private non-sectarian . . . school . . . legally constituted and operated under constitution and laws of the state." As thus far administered, each grant amounts to two dollars a day based on an assumed school term of 180 days, or $360, but limited to an amount not to exceed the tuition obligation actually incurred by the applicant.

In 1961 the Legislature transferred 2.5 million dollars from the Public Welfare Fund to the Education Expense Grant to maintain tuition grants[10]. Act 147 authorized the monthly transfer of $200,000 from the Education Expense Grant Fund, supported by sales tax deductions, to a fund to be administered by the Commission. In 1963 the Legislature increased this amount to $300,000 a month.[11]

October 29, 1966, the Commission adopted a resolution stating, in part:

> "[T]he Commission has concluded that, except with respect to applicants on behalf of children attending private schools for retarded children, it will not pay tuition grants to applicants whose children attend any private school *predominately* maintained through such tuition grants. In order to avoid unnecessary disruption of the present classes with consequent injury to the students, this policy shall be effective for school sessions commencing after June 1967."

The resolution was adopted to meet the holding in Griffin v. State Board of Education, E.D.Va. 1965, 239 F.Supp. 560 (unappealed) and the definition of "public school" in the Civil Rights Act of 1964[12]. *Griffin* held that state tuition grants are an unconstitutional application of a grant in aid law and discriminatory state action *only* when they "predominantly maintain" a segregated school. For purposes of Title IV (Public Education), the Civil Rights Act of 1964, § 401c, defines "public school" as an institution "operated wholly or predominantly from or through the use of government funds or property.[13]" The Commission construes the resolution as authorizing payments to applicants attending a school supported by tuition grants which amount to any sum less than fifty per cent of the school's annual operating costs.

II.

Purpose and Motive

We are not unmindful of the distinction courts draw between "purpose" and "motive". We accept the first Justice Harlan's statement, quoted by the defendants: "In a legal sense the object or purpose of legislation is to be determined by its natural and reasonable effect, whatever may have been the motive of the legislature"[14].

Recognition of the distinction between purpose and motive does not prohibit courts looking beyond the face of the statute. As we said in Hall v. St. Helena, E.D.La. 1961, 197 F.Supp. 649, aff'd 368 U.S. 515, in holding unconstitutional an earlier version of Louisiana's grant in aid system:

> Irrespective of the terms of a statute, particularly in the area of racial discrimination, courts must determine its purpose as well as its substance and effect . . . "[A]cts generally lawful may become unlawful when done to accomplish an unlawful end." Western Union Tel. Co. v. Foster, 244 U.S. 105, 115.

See also the discussion in United States v. Louisiana, E.D.La. 225 F. Supp. 353, 361-63. In that case we considered the constitutionality of the Louisiana "understanding" or "interpretation" test as a requirement for registration to vote. We said, "Purpose carries the meaning of Coke's 'true reason' for the law in the light of the situation at which it is aimed.[15]" We quoted from a well known lecture by Mr. Justice Frankfurter:

> Laws are not abstract propositions. They are expressions of policy arising out of specific situations and addressed to the attainment of particular ends . . . And the bottom problem is: What is below the surface of the words and yet fairly a part of them?[16]

In the Louisiana Constitutional Convention of 1921 the bottom problem in devising registration provisions was, how to draft registration requirements that would appear to be neutral but would have the necessary effect of keeping any large number of Negroes from voting; the "grandfather" clause had been declared unconstitutional.[17] The Convention's solution was to bring out of limbo the "understanding" or "interpretation" test[18] which the Constitutional Convention of 1898 had considered but rejected in favor of the "grandfather" clause.

There is no doubt that here the bottom problem, the situation at which Act 147 is aimed, is the desegregation of the public schools. The same problem had confronted other sessions of the legislature. Since 1958 the Louisiana legislative solution has been to offer the alternative of so-called "private" schools supported by state tuition grants. Public expressions by the legislators on the subject may or may not reveal the

motives that actuated their vote. The Court is not interested in their motives. The Court is interested in their public expressions indicative of the legislative purpose, as the legislators understood the purpose of the legislation.

Time and again under the equal protection clause, because of the purpose and effect of a law, courts have struck down state laws fully within the power of the State to enact. See particularly Gomillion v. Lightfoot, 1960, 364 U.S. 339, 81 S.Ct. 125, 5 L.Ed.2d 110 and Grosjean v. American Press Co., 1936, 297 U.S. 233, 56 S.Ct. 444, 80 L.Ed. 660. *Gomillion* involved the unchallengeable power of a state legislature to determine municipal boundaries; the face of the law was flawless. "When a state exercises power wholly within the domain of state interest, it is insulated from judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right." 364 U.S. at 347. *Grosjean* involved nothing more than a graduated tax on newspaper and theatre advertising. Under its fair appearance was the ugly fact that the legislature enacted the law to punish New Orleans newspapers critical of Huey Long. A unanimous Court said:

> [The tax] is bad because, *in the light of its history and of its present setting*, it is seen to be a deliberate and calculated device in the guise of a tax to limit the circulation of information to which the public is entitled in virtue of the constitutional guaranties. 297 U.S. at 250.

III.

The Purpose as Shown in the History and Present setting of Act 147

Prompted by *Grosjean*, we consider first the purpose of Act 147, "in the light of its history and present setting". We have used the same approach in considering Louisiana legislation dealing with voting rights. See United States v. State of Louisiana, E.D.La. 1963, 225 F. Supp. 353.

A. The Louisiana Constitution of 1845, replacing that of 1812, and the Constitution of 1852 provided for "free public schools". In 1847 the legislature enacted the first Louisiana public school act, providing at least three years for "any youth (white, of course) under 21."[19] At that time and until 1864, the Black Code of Louisiana and other laws levied heavy fines and severe punishments on those who taught slaves to read and write.[20] In 1864 General Nathaniel P. Banks, Commander of the United States forces in the Department of the Gulf, stationed in New Orleans, called a Constitutional Convention, although only the southern half of the State was under Union military control. The Convention approved a constitution that for the first time provided "for the education of *all* children of the State". Apparently, this provision contemplated separate schools for Negro children[21]. When the legislature took no action, General Banks, on his own responsibility, created a Committee on Enrollment that established the first public schools for Negroes in Louisiana. The following year the Freedman's Bureau took over the administration of these schools[22]. In 1868 "radical" Reconstruction brought a new constitution. This one provided for public schools "without distinction of color, race, or previous condition" and declared, there "shall be no separate school or institution of learning established exclusively for any race by the State of Louisiana". (Art. 135) Under this unprecedented organic law, the Louisiana legislature adopted Act 178 of 1869 establishing mixed public schools. This statute failed to bring about any substantial school desegregation. There were some mixed schools in New Orleans, but there were no such schools in the rural parishes. Professor Edwin W. Fay, author of an authoritative study of education in Louisiana, states, "In 1870 almost no white children were attending the public schools"[23]. As a result, the Peabody Fund, established to aid public education, in Louisiana, was "administered

at this time for the benefit of whites [in private schools] exclusively"[24]. The Constitution of 1870 was adopted when the Reconstruction period in Louisiana was far from being over, but in effect the Constitution gave its blessing to the dual system of segregated schools. This constitution substituted the language of 1864 for the language of 1868. "By 1877 separate schools had been established for the two races and in that year there were 54,390 pupils in attendance in the public schools, while the number capable of enrollment was 266,033"[25]. In 1898, Louisiana, along with other southern states, for the first time specifically adopted Jim Crow provisions[26]. Article 238 of the Constitution of 1898 provided for "free public schools for the white and colored races, separately established". The Constitution of 1913 and the present Constitution of 1921 carried forward similar language.

In 1954, a few months after the Supreme Court decided the first *Brown* case desegregating public schools, Louisiana amended Article XII, Section 1 of the Constitution of 1921. This amendment expressed the state policy on segregated schools:

> "[A]ll public elementary and secondary schools [in the State of Louisiana] shall be operated separately for white and colored children . . . This provision is made in the exercise of the state police power to promote and protect public health, morals, better education and the peace and good order in the State, and not because of race. The Legislature shall enact laws to enforce the state police power in this regard."[27]

The Legislature promptly enacted Acts No. 555 and 556 of 1954. Act 555 implemented the constitutional requirement of separate schools and provided penalties for failing to observe it. Act 556 provided for the assignment to a school of each pupil each year by the superintendent of schools of the district in which the pupil lived. In February 1956 this Court held that both the amendment to Article XII Section 1 and

the two statutes were invalid, and enjoined the Orleans Parish School Board from requiring and permitting segregation in the parish public schools. Bush v. Orleans Parish School Board, E.D.La. 1956, 138 F. Supp. 337; aff'd 242 F. 2d 156, cert. den'd. 354 U.S. 921.

The Louisiana Legislature immediately enacted a new package of laws. Act 319 of 1956 purported to "freeze" the existing racial status of the public schools in Orleans Parish and to reserve to the legislature the power of racial reclassification of the schools. The Court declared this "legal artifice" unconstitutional on its face. Bush v. Orleans Parish School Board, E.D.La. 1958, 163 F. Supp. 701, aff'd 268 F. 2d 78.

In 1958 the legislature enacted another bundle of school laws. Professor Charles A. Reynard of Louisiana State University has described these as follows:

> Adhering to its steadfast course of circumventing the Supreme Court's decisions forbidding the enforced segregation of the races in public education, the Legislature took steps to provide for the closing of public schools threatened with desegregation and authorized a system of publicly financed private education in lieu thereof. A pupil assignment law, applicable to the public schools, was also adopted. These measures were designed to fill the void created by the decisions of the federal courts invalidating acts adopted at the 1956 session, . . . which, in turn had been adopted to replace legislation passed in 1954, declared unconstitutional by the courts. Reynard, Legislative Symposium: Segregation, 19 La. L. Rev. 114 (1958).

Act 257 provided in detail for the establishment of educational cooperatives. Act 258 established the first Louisiana system of grants-in-aid for "children attending non-sectarian non-public schools". Its purpose was obvious: The aid was conditioned on there being "no racially separate public school" in the parish. The grant system was to be administered joint-

ly by the State Board of Education and the parish or city school boards.

By 1959 it was apparent to all that the Orleans Parish School Board could not take independent action to carry out the Court's order of February 15, 1956, requiring it to desegregate public schools in New Orleans. July 15, 1959, therefore, the Court ordered the Board to file a desegregation plan by March 1, 1960. Later, the Court extended the deadline to May 16, 1960. When the Board failed to file a plan, the Court, on May 16, 1960, entered an order setting forth a plan of desegregation for the Orleans Parish School Board to follow. The plan called for the desegregation of the first grade in September 1960.

The Louisiana Legislature promptly built additional barricades. Act 333 of 1960 prohibited the furnishing of free books, school supplies, school funds or assistance to integrated schools. Act 495 authorized the Governor to close integrated schools. Act 496 purported to "freeze" the racial classification of public schools and reserve to the Legislature the power to change this classification. Act 542 authorized the Governor to close the public schools in case of riots and disorder.

The tempo of resistance increased. July 29, 1960, the Attorney General of Louisiana obtained an injunction in the state courts restraining the Orleans Parish School Board from desegregating its schools. August 17, 1960, the Governor of Louisiana, acting under Act 495 of 1960, took over control of the Orleans public schools. August 27, 1960, a three-judge district court struck down these actions along with Acts 333, 495, 496, and 542 of 1960, Act 555 of 1964, Act 319 of 1956, and Act 256 of 1958. Bush v. Orleans Parish School Board, E.D.La. 1960, 187 F. Supp. 42.

At this point, the Orleans School Board conferred with the district court. In public session the Board adopted a grade-

a-year plan, postponed to November 4, 1960, and announced its intention to comply with the Court's orders.

Five extraordinary sessions of the legislature within four months followed. Among other actions, the Legislature seized the funds of the Orleans Parish School Board; forbade banks to lend money to this Board; removed as fiscal agent for the state the Bank which honored payroll checks issued by the Orleans Board; ordered a school holiday on November 14, 1960; discharged four of the five Orleans Board members; later repealed the Act creating the Board, then twice created a new School Board for Orleans Parish; and still later discharged the Superintendent, dismissed the Board's attorney, and attempted to require that the State Attorney General be counsel for the Board. The courts declared these and other related acts unconstitutional. Bush v. Orleans Parish School Board, E.D.La., Nov. 30, 1960, 188 F. Supp. 916; Bush v. Orleans Parish School Board, E.D.La., March 3, 1961, 191 F. Supp. 871; and Bush v. Orleans Parish School Board, E.D.La., May 4, 1961, 194 F. Supp. 182.

Act 3 of the Second Extraordinary Session of 1960 was the Legislature's second version of grants-in-aid. This law differs from Act 258 of 1958, which it repealed, in two respects. First, the legislature did away with the provision that availability of tuition grants was dependent on the integration of the public schools in the parish. Second, it restricted grants to non-profit schools. The administration of the grant system continued to be the joint responsibility of the State Board of Education and the parish or city school boards. On the day the Senate passed Act 3, State Senator E. W. Gravolet described the bill as designed to "dove-tail" with Act 257 of 1958, which authorized educational cooperatives, and commented that the grant-in-aid principle had been used successfully for a private school system in Prince Edward County, Virginia[28]. At a meeting of the White Citizen's Council in

New Orleans on December 15, 1960, the Secretary of State of Louisiana, Wade O. Martin, predicted that Louisiana would go from public to private schools so that every child would have a check or money to go to the school of his choice; the white schools would accept white students, and the "black schools" would accept Negro students[29]. In the Louisiana House of Representatives December 21, 1960, Representative Triche of Assumption Parish argued that the grant-in-aid system was the most effective weapon against the integration of public schools and that the tax was needed to continue the fight for a segregated school system in Louisiana[30].

In 1961 the Court of Appeals for the Fifth Circuit affirmed orders requiring the desegregation of public schools in East Baton Rouge and St. Helena Parishes. On the same day the Governor of Louisiana called the Second Extraordinary Session of the Legislature for 1961. He certified as emergency legislation what became Act 2 of that session. Act 2 masqueraded as a local option law. It gave each parish or municipal school board the "option" to close its schools if a majority of the qualified voters in the parish or municipality voted in favor of such action. The school board was then authorized to dispose of its property for such consideration as it deemed appropriate. Act 257 of 1958 had created educational cooperatives which could acquire the property and then operate schools with the state money furnished by the grant-in-aid program provided for in Act 3 of the Second Extraordinary Session of 1960. In Hall v. St. Helena the Court characterized the option for a poor parish such as St. Helena as an option to attend segregated schools - or no schools. 197 F.Supp. 149, aff'd per curiam, 368 U.S. 515.

Act 9 of the 1961 Second Extraordinary Session of 1961 transferred $2,500,000 from the Public Welfare Fund to the Education Expense Grant Fund for grant-in-aid use. Act 10

of the same session transferred $200,000 monthly from the sales tax collections to the same fund for the same purpose.

In Hall v. St. Helena Parish School Board, E.D.La. 1961, 197 F. Supp. 649, aff'd per curiam, 360 U.S. 515, holding the grants in aid unconstitutional, the court stated:

> Under Act 3 . . . the parish school boards would continue to supervise the "private" schools, under the state board of education, by administering the grant-in-aid program of tuition grants payable from state and local funds . . .
>
> This analysis of Act 2 and related legislation makes it clear that when the Legislature integrated Act 2 with its companion measures, especially the "private" school acts, as part of a single carefully constructed design, constitutionally the design was self-defeating. Of necessity, the scheme requires such extensive state control, financial aid, and active participation that in operating the program the state would still be providing public education. [The state would not be doing business at the old stand, but the state would participate as the senior and not silent partner in the same sort of business.] The continuance of segregation at the state's public-private schools, therefore is a violation of the equal protection clause.

This brings us to the 1962 session. First, the legislature repealed outright the state's compulsory school attendance law, Act 128. (Two years before, in Act 28 of 1956, the law was made inapplicable in a parish where the public school system had been ordered to integrate.) Act 342 of 1962 appropriated funds for the schools of St. Bernard Parish to compensate for expenses incurred in providing facilities for pupils who were not residents of St. Bernard; most of these were white students who had left the desegregated schools in neighboring Orleans Parish. Act 67 of 1962 purported to restrict the right to sue parish school boards, except by authorization of the Legislature.

This was the background and setting when the Louisiana Legislature enacted the statute under attack in this case. The Act transfers administration of tuition grants from the Board of Education to the Louisiana Financial Assistance Commission, provides that tuition grants be made directly to the parent rather than to the parent and school jointly and, to attract entrepeneurs, waives the requirement that schools attended by students receiving tuition grants be non-profit organizations. In all other significant respects Act 147 is substantially identical with the 1960 tuition grants statute.

B. In 1962 the legislative sponsors of Act 147 and some of the persons directly responsible for the operation of the grant-in-aid program were not reluctant to announce the purpose of the legislation.

State Senator E. W. Gravolet, Jr., was Senate Floor leader for the passage of the Act, vice-chairman of the Joint Legislature Committee on Segregation, and Chairman of the Financial Assistance Commission from its inception. He stated:

> "It was primarily because of that federal court decision, [*Hall v. St. Helena Parish School Board*] combined with the one in Virginia that the Louisiana Legislature took away the administration of the tuition grants from the State Board of Education and the local school boards and created a new commission to disburse the tuition grants directly to the child, following the constitutional theory that grants directly to the child by the states were legal.
>
> The federal court went out of its way in the *St. Helena* case to point out that grant-in-aid could be attacked as being state action under the 14th amendment of the United States Constitution if they were administered by the local school board, because the various private schools would be classified by federal courts as private-public schools." New Orleans Times-Picayune, December 5, 1963.

Immediately after Act 147 had been passed, Senator

Gravolet described the establishment of the defendant Commission as a means to give citizens a choice whether they want to send their children to desegregated schools. He said, further, that if any large number of Negroes enroll at either public or parochial schools "we may have a lot of makeshift cooperative schools.[32]" His reference was to so-called educational cooperatives, private non-sectarian schools, the establishment of which were made possible by LSA-R.S. 17:2801, enacted on the same day as Act 258 of 1958, the first tuition grant statute. Shortly thereafter, Gravolet, as newly appointed Chairman of the Commission, said that he understood the commission would establish a brand new state department with a permanent staff to channel state funds to applicants seeking to avoid integrated schools by attending private non-sectarian schools.[33]

In a letter which Senator Gravolet signed as Chairman of the Commission, distributed in January of 1964, during the second gubernatorial primary election, he stated, in full:

> I enclose a New Orleans clipping showing Morrison's[34] statement that he is unalterably opposed to state grant-in-aid to help your children go to a private segregated school of your choice, instead of having to go to a racially integrated school.
>
> Your only hope to continue to get school checks to help your children go to private schools is by electing John McKeithen governor on Saturday, January 11.
>
> E. W. Gravolet, Jr.
> Chairman
> Louisiana Financial
> Assistance Commission

The Vice-Chairman of the Commission, Representative Lantz Womack, stated to a Citizens Council meeting in New Orleans on December 4, 1963, that the grant-in-aid program was started in 1958 "but very little use was made of it until the integration move began in New Orleans.[35]"

The chairman of the State Sovereignty Commission and advisor to the then Governor Davis, Frank Voelker, Jr. stated several times prior to the passage of Act 147, that the grant-in-aid system would be transferred from the State Department of Education to a new and separate agency.[36] He further stated, "If the present grants in aid is carried to the federal courts it probably would be knocked out because it is really the state operating the schools."[37]

After a bond issue to aid in financing the tuition grant program had been defeated at the polls in November of 1962, James D. Fountain, then assistant director of the defendant Commission, said, "I think we can operate within our present revenues, unless there is a mass integration effort."[38]

C. The present Louisiana tuition statute, like its counterpart in Alabama, was "designed to fill the vacuum left by this Court's injunction against the [earlier] tuition statute". *Cf.* Lee v. Macon County Board of Education, M.D.Ala. 1967, 267 F. Supp. 458, 477. Waiting in the wings is Act 99 of 1967, designed to fill the vacuum that will result from our injunction against Act 147. The 1967 model provides "financial aid scholarships to needy children enrolled in private non-sectarian elementary and secondary schools located in this state *whose parents choose not to enroll said children in the public education facilities of this state*", because they are "mindful of the increase in juvenile delinquency, school dropouts and juvenile crime rates . . . mindful that the parent, not the State of Louisiana, shall be the determining force which shall decide on the type of education ultimately received by the child . . . [but] lack of the finances which would enable them" to enroll their children in private schools."

Thus, for a hundred years, the Louisiana legislature has not deviated from its objective of maintaining segregated schools for white children. Ten years after *Brown*, declared policy became undeclared policy. Open legislative defiance of

desegregation orders shifted to subtle forms of circumvention —although some prominent sponsors of grant-in-aid legislation have been less than subtle in their public expression. But the changes in means reflect no change in legislative ends.

IV.

Effect of Act 147

The problem of fairly ascertaining the effect of a statute becomes complicated when the degree of a state's involvement in private discrimination is non-obvious. In Burton v. Wilmington Parking Authority, 1961, 365 U.S. 715, 81 S.Ct. 856, 6 L.Ed.2d 45, the Supreme Court observed, "Only by sifting facts and weighing circumstances can the non-obvious involvement of the State in private conduct be attributed its true significance." 365 U.S. at 723.

In our earlier opinion in this case we held that "any amount of state support to help found segregated schools or to help maintain such schools is sufficient to give standing to Negro school children to file the kind of complaint filed in this case." 258 F. Supp. at 164. We concluded, however, largely because of *Burton*:

> "This case should be decided after a full trial on the facts. The extent to which the tuition grants contributed to the founding of the quasi-public schools, in dollars an das a stimulus, the extent to which the grants now contribute to the support of the quasi-public schools, the extent of state involvement and control, and other factors relevant to state action can be determined only by a trial on the merits."

The inevitable effect of the tuition grants was the establishment and maintenance of a state-supported system of segregated schools for white children, making the state a party to organized private discrimination.

A. There are 67 school districts in Louisiana, 15 of which were not, at the opening of the 1966-67 school year, under court order to desegregate. There are 79 private, non-

sectarian schools in nine school districts. In seven of these school districts private schools were formed after enactment of Act 147: East Feliciana, East Baton Rouge, Jefferson, Orleans, St. Tammany, Bogalusa (Washington), Plaquemines. In these districts public schools are desegregated by court order.[39] Of the 79 schools, 62 are for normal children: 60 for white pupils, two for Negro pupils. Each of these schools is segregated.[40]

Before 1954 there were 16 private schools in the state, all but one located within the New Orleans Metropolitan area. After 1954 but before enactment of the 1960 tuition grant statute, nine additional schools were started. Between enactment of the 1960 law and enactment of Act 147 in July 1962, eight more private schools came into being. Between the enactment of Act 147 and the time of this case, 36 additional schools for white children began operation. Thus 44 of the 60 private schools for white children were formed after the first desegregation of public schools in 1960.

B. (1) The amounts the newly organized schools charge for tuition show that these schools could not have come into existence and could not have continued to exist without the state's grants in aid. This inference finds especially strong support in the tuition charged by post-1962 schools. The Commission set tuition grants at two dollars a school day for each recipient, or $360 on an assumed school year of 180 days.[41] The following table shows the close correlation between the amount of the grant and the amount the schools charged for tuition:

POST-1954 PRIVATE SCHOOLS

White, Non-Retarded School and Date School Began	Tuition/Year	No. of Students and Recipients*
Agnew Town and Country Day School (1957)	$360	245 (72)
Edith Ashley School (1962)	405	36 (36)
Aurora Gardens Academy (1964)	$450-675	508 (455)
Belle Chasse School Association River Oaks Academy (1966)	450	1,251 (1,222)
Boothville-Venice School Association, Seaway Academy (1966)	450	295 (347)
Buras School Association, Delta Heritage Academy (1966)	450	641 (634)
Carrollton Private School (1962)	360	123 (118)
Child's World School (1963)	360	99 (109)
Connor-Parkview School (1956)	400-450	125 (127)
John Curtis Christ School (1962)	360-450	650 (595)
D and D Private Elementary School (1963)	432-468	31 (29)
East Bank School Association, Promised Land Academy (1966)	450	251 (261)
Ecole Classique (1955)	550-625	526 (406)
First Educational Co-operative, Mirabeau Elementary School (1962)	360	173 (157)
Garden District Academy (1959)	450-750	125 (86)
Gentilly Private School (1962)	540	301 (289)
Grawood Christian School (1960)	360	246 (215)
Hardwicke-MacMasters School (1963)	540	162 (241)
Helena M. Hart Memorial School (1962)	390-445	184 (168)
Jefferson Academy (1965)	360	192 (179)
Kehoe Academy (1962)	375-400	400 (313)
Kehoe-France School (1965)	400	62 (58)
Lake Castle Private School (1963)	385-400	340 (290)
Lake Charles Christian Institute (1961-62)	378	64 (52)

Lakewood Private Elementary School (1960)	350-420	190	(166)
James Madison High School (1963)	405-450	175	(211)
Marquez Learn and Play (1956)	360	72	(17)
James H. Murphy School (1962-63)	468	106	(83)
New Orleans Hebrew Academy (1960)	400	7	(4)
New University School (1964)	450	200	(275)
Walter Parker Elementary School (1966)	360	68-70	(115)
Port Sulphur School Association Rudolph McBride Academy (1966)	450	193	(235)
Prytania Private School (1960)	480	674	(636)
Riverview Preparatory School (1961)	380	574	(591)
Silliman Private School (1965)	360	125	(146)
Sycamore Progressive School (1966)	405	66	(65)
Tamanny (1966)	400	135	(121)
United Elementary School (1962)	360	135	(65-66)
Uptown Elementary School (1962)	380	128	(129)
Vieux Carre School (1957)	360	55	(26)
Marjorie Walters (1960)	500	452	(408)
Walters, Inc. (1956)	1,710 (including room & board)	70	(43)
Wilde Private Elementary School (1960)	360	117	(119)
Wonderland School (1960-62)	450	120	(112)
Seaway Academy of Venice (1966)	450	295	(347)

*The number of recipients is stated in the parenthesis. In each instance this number represents the total number who, at any time during the 1966-67 school year, received a tuition grant from the Commission.

The tuition at most of the pre-Brown non-special private schools, as one would expect, is much higher than the tuition at the post-Brown schools. This is the range of tuition at the old-line schools: $750-1000; $765-1000; $660-950; $680-870; $650-800; $612-676; $580-650; $462-714; $430-600; $430-600; $425-480; $380-410; $325-360; $360; $300-380.

(2) There are six private schools for retarded white

children in Louisiana. Three of these schools were formed after 1960; one was formed in 1957. These four schools charge the following tuition fees: $540, $360, $360, and $675.

There are ten private schools for retarded Negro children. Two were formed in 1966, four in 1963, one in 1959, two in 1956, and one in 1952. One of the schools charges tuition of $396 a year; all the others charge $360 a year or two dollars a day. In each school the number of tuition grant recipients exceeds or nearly equals the number of enrolled pupils.

Again we draw the inference that the state's tuition grants were directly responsible for the founding of most of the post-Brown special schools and that these schools continue to exist because of the state's educational policy of segregation.

C. The statistical tables in Appendix A. show that the state is becoming increasingly involved in supporting private segregated schools. The total number of recipients of tuition grants has increased from 7,093 in 1962-63 to 15,177 in 1966-67. As noted earlier, Act 147 initially authorized the monthly transfer of $200,000 from the education expense grant fund (Act. 10, 2nd Extraordinary Session of 1961, LSA-R.S. 47-318), supported by sales tax deductions, to a fund to be administered by the Commission. In the 1963 fiscal session tne legislature increased this amount to $300,000 a month.

D. The directors and principals of thirty-two private schools were deposed and questioned about their admissions policy. All but six were equivocal in their statements. The statements of many of these principals that they maintained no policy as to the admission of Negroes must come as a surprise and shock to the parents who have children attending these schools.[42] We find such statements incredible.

Two others, while stating that they would accept a Negro applicant who met their requirements, said that their schools had very stringent social and moral qualifications. Indeed,

the Garden District Academy requires, as a prerequisite to admission, the recommendations of two patrons of the school. All of the patrons are white. A similar requirement, maintained by the University of Mississippi was held to constitute racial discrimination in Meredith v. Fair, 5 Cir. 1962, 268 F.2d 696, 701.

Of the six who gave definite answers, five stated that their schools were open only to Caucasians. The remaining deponent stated that she would accept any Negro child who met the standards required of white students.[43]

More credible is the testimony of Charles LaCoste, former director of the Carrollton Elementary School. He testified that the basic purpose for the organization of the school was to avoid public school desegregation and that the existence of tuition grants allowed that purpose to be accomplished. Further, he testified that after public schools were desegregated in New Orleans, his group met with Armond J. Duvio, one of the chief organizers of private schools in Ne wOrleans. In these meetings, the group discussed tuition grants and public school desegregation in relation to the formation of the private schools.

E. Two examples, one of a single school and the other of a parish-wide system, illustrate the close relationship between the state's grants-in-aid and the formation of private segregated schools for white children: (1) The Ninth Ward Elementary School, now the Riverview Preparatory School; and (2) Plaquemines Parish.

(1) Mr. Armond Duvio withdrew his child from the Frantz Elementary School in New Orleans November 14, 1960, the day that school was desegregated under the court order issued in Bush v. Orleans Parish School Board. Most of the other white parents similarly boycotted the Frantz School. Mr. Duvio then made arrangements with Mr, Joseph Davies, the Superintendent of Schools in St. Bernard Parish, for a

school to be operated exclusively for the benefit of those white students boycotting the Frantz Elementary School and McDonough Nineteen Elementary School, the other desegregated school in New Orleans at that time. The St. Bernard Parish School system supplied the teachers, textbooks and other assistance.

In the following school year, 1961-1962, Mr. Duvio established the Ninth Ward Elementary School for white students. Five Hundred white students attended that school during its first year. The Commission sent tuition grants for all of the students to a post office box maintained by the school. At that time the tuition was $1.67 a day, the exact amount received from the tuition grant program, at that time administered by the State Department of Education and the local school boards.

Since the 1962-1963 school year, the Ninth Ward Elementary School has been financed by tuition grants administered by the defendant Commission. Starting in that school year, the tuition charge became the same as the amount available from the defendant Commission — $360 a year.

(2) A school desegregation suit was filed against the Plaquemines Parish School Board and its Superintendent, on July 19, 1966. Shortly thereafter public meetings were held in four of the then all-white public schools in Plaquemines Parish. At each of these meetings, Leander H. Perez, Sr., President of the Plaquemines Parish Commission Council, was introduced by the respective school principals. Mr. Perez advised the people that he had dedicated his life to opposing the integration of the schools; that the white people in a school system in Virginia had set up private schools for their children to avoid integration, and that these private schools were working well; that the Parish was considering the establishment of private schools. On August 5, 1966, the District Court ordered the Commission Council, its president, Leander H.

Perez, and its members added as defendants upon a showing by the United States that school properties had been transferred from the School Board to the Commission Council, on July 8, 1966. On the same day the Court issued a temporary restraining order enjoining all the defendants from disposing of such school properties.

August 26, 1966, the Court entered a preliminary injunction providing for the desegregation of six grades. About 174 of 1900 Negro school-age children chose to attend the five previously all white schools in the parish.

As a result of the Court's desegregation order, parents of white students instituted a boycott of the formerly all-white schools of Plaquemines Parish. As of September 26, 1966, the attendance at the formerly all-white schools of Plaquemines Parish, as compared with the 1965-1966 school year, decreased as follows:

	1965-66	9/26/66
Belle Chasse High School	1,632	125
Buras High School	1,895	1,175
Port Sulphur High School	935	721
Boothville-Venice High School	821	500
Woodlawn High School	247	0

Before the Court's desegregation order there were no non-sectarian private schools operating in Plaquemines Parish. After suit was filed, private school organizations were formed in each of the areas in Plaquemines Parish where public schools are located. September 8, 1966, Leander H. Perez, Jr., District Attorney for Plaquemines Parish, made the following statement in reference to his responsibility to enforce the criminal statute requiring that parents send their children to school.

> To elaborate on the statement by W. C. Hohmann to the effect that parents cannot keep their children out of public schools without a good excuse, I, as district attorney, take it as my duty to the peo-

> ple of Plaquemines Parish to inform them that if parents are planning to set up private schools for their children, and there is some delay involved, I will not prosecute parents for not sending their children to public schools. I consider a delay of two months, as was occasioned last September due to Hurricane Betsy when the schools remained closed, a reasonable time within which to send their children to private schools."

Because of the large number of applicants from Plaquemines Parish, the Louisiana Financial Assistance Commission established offices in Belle Chasse and Buras in that Parish for the distribution of grant-in-aid application forms. The office remained open during the formation and construction of the private schools in Plaquemines Parish.

Five private non-sectarian schools were established in Plaquemines Parish in September, October, and November 1966. During this period, the former principals of the public schools resigned to become principals of the private schools. These men encouraged the public school teachers to resign by extolling the virtues of private schools as compared with the public schools. The attorney for the Plaquemines Parish School Board informed the teachers that the future of the public school system appeared terribly bleak. These and other measures resulted in various faculty resignations from the public schools. A great majority of the private school teachers and other staff members came directly from the public schools. The record shows that at least 88% of the students attending the new private schools in Plaquemines Parish formerly attended the public schools of that parish.

F. The Commission has been fortunate in having an able, fair, and conscientious Director (now Assistant-Director), James B. Fountain. He and the Commission have tried but found it impossible to eliminate state involvement in the operations and management of private schools. Faithful adherence to legislative mandates and to the integrity of the

public fiscs have compelled the Commission to engage in certain supervision of the schools. The Act requires that the applicants be "eligible for admission" to public schools, that the children regularly attend school, that the school be non-sectarian, and that the institution attended qualify as a school. The Commission has interpreted this last requirement to mean that the school must be a bona fide school with qualified teachers and adequate textbooks, for example, the free textbooks distributed by the State. The Commission relies on its own agents and on "visiting teachers" employed by the State Department to administer the compulsory school attendance law and to inspect the schools to determine if they meet sufficient standards to operate as schools.

Mr. Fountain testified that the Commission relies "fairly heavily" on the visiting teachers and the educators in the State Department of Education. If they "allow the school to be open, [then] it must be a school". Also, the Commission "ascertains if the school children in that particular school are receiving . . . textbooks from the State of Louisiana". He testified that the Commission has "agents going to most schools". The agents "ascertain the enrollment" in each school of applicants receiving tuition grants.

In one instance the Commission decided that grants should be discontinued to nine applicants attending "a shabby school" in a garage where there were no qualified teachers and the pupils did not receive textbooks from the State Department of Education. In another instance the Commissioner questioned whether the New Orleans Hebrew Academy, which had only seven students, could qualify as a school. In addition, since the school was administered by a rabbi, the Commission questioned whether the school was non-sectarian. After a hearing with the parents in which the Commission learned that the rabbi had withdrawn and that a qualified teacher had been employed, the Commission decided to make the grants

to the children who attended New Orleans Hebrew Academy.

The Commission has met with a parent group "to ascertain just if the school was being operated properly, that is, that no hanki-panki was going on". The Commission has cooperated with the parents and others establishing private schools in Plaquemines Parish and in New Orleans, by opening temporary branch offices to expedite the handling of grants in emergency situations.

G. In effect the state has established a second system of schools, competitive with the public school system. The public schools no doubt will survive such competition but only after sustaining severe damage detrimental to the system and to students attending public schools. For example, of the 345 teachers in private schools organized since 1962, 139 teachers or 35% came from the public schools.

There are 5,187 white children in pre-1954 private schools. 3,483 receive grants although many attend expensive, fashionable, endowed schools, such as the Louise McGehee School for Girls, Newman School, and Metairie Park Country Day School.

There are 4,029 students attending private schools formed between 1954 and enactment of Act 147; 3,336 receive grants. Attending schools formed after enactment of Act 147 are 7,376 white children, of whom 6,874 receive grants; 386 Negro children, of whom 366 receive grants. In the seven districts where private schools were formed after 1962, there are 244,158 students enrolled in the public schools; 7,762 students enrolled in the private schools, of whom 7,240 receive grants. *It is a fair inference that these substantial numbers of white students at private schools represent only a small fraction of the number that will enroll in such schools, should the courts bless the state tuition grant program.*

In brief, the evidence produced in court of the actual effect of Act 147 substantiates the view of the purpose and

the natural or reasonable effect of the law to be inferred from an understanding of Act 147 in its historical context and legislative setting. The tuition grants authorized under the Act provided the funds indispensable to establishing newly organized private segregated schools for white children. The tuition grants continue to furnish almost all of the funds needed for maintaining these post-Brown schools. What Hall v. St. Helena forbade the State to do directly, it has attempted to accomplish indirectly. The tuition grants damage Negroes by draining students, teachers, and funds from the desegregated public school system into a competitive, segregated "quasi-public" school system. The stamp of State approval of "white" schools perpetuates the open humiliation of the Negro implicit in segregated education.

V.

The Defendants' Authorities;
Lee v. Macon County;
The Griffin test.

The defendants insist that Act 147 stands alone, and that it is constitutional on its face and as applied.

A. Defendants' counsel resort to history, going back to colonial times ,to trace the record of public assistance to private schools. But as we noted in our discussion of the statutory purpose (Section II of this opinion), the overriding constitutional principle here is that "acts generally lawful may become unlawful when done to accomplish an unlawful end". The unlawful end and necessary effect of the Louisiana tuition grants were to establish and maintain a system of segregated schools for white children, in violation of the equal protection clause.

In suport of their contention, counsel cite, Meyer v. Nebraska, 1923, 282 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042; Pierce v. Society of the Sisters, 1925, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070; Cochran v. Louisiana State Board of Education,

1930, 281 U.S. 370, 50 S.Ct. 335, 74 L.Ed. 113; and Everson v. Board of Education, 1947, 330 U.S. 1, 67 S.Ct. 504, 91 L.Ed. 711. *Meyer*, a due process case, held that a state law prohibiting the teaching of "any subject to any person in any language other than the English language" is "arbitrary and without reasonable relation to any end within the competency of the State". The Court observed, "Determination by the legislature of what constitutes proper exercise of police power is not final or conclusive, but is subject to supervision by the courts". In *Pierce* an Oregon statute in effect prohibited private elementary schools by requiring children between the ages of eight and sixteen to attend public schools. The Court held that the statute violated due process in unreasonably interfering with the liberty of parents by forcing their children to accept instruction from public teachers only. *Cochran* involved state-supplied schoolbooks, *Everson* state-supplied bus transportation to all pupils. In these two cases, the question was whether the expenditure of public funds for private purposes violated the due process clause. In each case the Court recognized that the taxing power of the state was exerted for a public purpose.

The shafts cut from these due process decisions miss their target. None of these cases involved the equal protection clause. The Supreme Court had very little difficulty in *Cochran* and in *Everson* in recognizing a public purpose in legislation facilitating the opportunity of children to get a secular education. But in *Cochran* the Court pointed out, "The schools, however, are not the beneficiaries of these appropriation . . ." And in *Everson* the Court pointed out, "The fact that a state law, passed to satisfy a public need, coincides with the personal desires of the individuals most directly affected is certainly an inadequate reason for us to say that a legislature has erroneously appraised a public need". On the facts before us, the private schools established in Louisiana are direct bene-

ficiaries of the grants in aid; the children or the parents are conduits to the schools.

B. The 1958 program invalidated in Hall v. St. Helena Parish School Board, E.D. La. 1961, 197 F. Supp. 649, aff'd 368 U.S. 515, allowed parish school boards to close public schools under desegregation orders and to lease the buildings to private persons and cooperatives. The present program funnels public funds into the hands of private persons who are thereby enabled to provide different school buildings but count on having the same students and teachers. The 1962 plan has the same purpose and many of the effects of the 1958 plan.

A parallel development took place in Alabama, which has also had three successive tuition grants programs. In 1956 Alabama authorized each local board of education to close public schools when it found that continued operation of the schools would "be accompanied by such tensions, friction, or potential disorder or ill will within the school as substantially to impair effective standards or objectives of education of is pupils".[45] This statute, like the 1958 Louisiana law, authorized tuition grants for students attending private nondenominational schools in districts where no public school was available. In 1964 a three-judge court in Lee v. Macon County Board of Education, M.D.Ala., 231 F. Supp. 743, held that the law was unconstitutional. In 1965, Alabama, like Louisiana, adopted a more refined substitute for the earlier version. This new statute was cast in terms of making eligibility turn on the parent's judgment that the child's attendance at public school would be detrimental to the child's "physical and emotional health". In 1967, in the most recent decision in Lee v. Macon County, 267 F. Supp. 458, the same three-judge court held: The tuition grant statute was "designed to aid and assist private discrimination of the kind that would be condemned if attempted by the state. As such the statute is unconsti-

tutional:" In reaching this conclusion the court applied criteria we consider applicable to the case before this Court:

> [L]ocal authorities are under an affirmative constitutional duty to provide equal educational opportunities for all children by ceasing to discriminate on the basis of race and to the extent herein noted and ordered, eliminating the effects of past discrimination. To obviate the performance of this duty, a state may neither operate and maintain two school systems-one integrated, one segregated-giving public school students a choice between the two, nor simply go out of the business of running schools in some school districts and allow that function to be undertaken by private persons. It is also axiomatic that a state may not induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish. ¶ Measured against these criteria and when viewed in the context of the facts and circumstances which gave rise to its enactment, the vice of the present tuition statute becomes clear: it is but another attempt of the State of Alabama to circumvent the principles of *Brown* by helping to promote and finance a private school system for white students not wishing to attend public schools also attended by Negroes. ¶ Alabama's present tuition statute must be analyzed in the historical context which gave rise to its enactment. It is unmistakably clear that the concept of tuition grants to students wishing to attend private schools in Alabama was born of an effort to resist and frustrate implementation of the *Brown* decision. 267 F. Supp. at 475, 476.

C. The Virginia system of tuition grants was invalidated in Griffin v. State Board of Education, E.D.Va. 1965, 239 F. Supp. 560 (unappealed). The Virginia tuition statute authorized grants of $125 a year for elementary pupils and $150 a year for high school students. This money came from the State Treasury. In addition, each local school board could pay

each child an amount equal to the amount the State provided. A three-judge court stated, and we agree:

> With the plaintiffs, we think the State cannot ignore any plain misuse to which a grant has been or is intended to be put. Nor do we think weight is to be accorded the fact that the money is paid to the pupil or parent and not to the school, for the pupil or parent is a mere channel. Cf. Almond v. Day, 197 Va. 419, 89 S.E.2d 851, 857 (1955). These premises of decision have especial significance here because the issue is the right of the State or locality to make, and not the right of the pupils, parents or schools to take, the grants. 239 F. Supp. 560, 563.

The court found, "incontestably, that the grants are the main support" of each of the segregated schools:

> This contribution is of such relative magnitude that they plainly are State supported institutions. Thus the State is nurturing segregated schools. Hence, the defendants must be enjoined from providing money to be funnelled by the parents into these schools so long as segregation is practices in them. 239 F. Supp. 560 at 565.

We have made a similar finding and reached a similar result in this case.

In *Griffin*, however, the court held that the Virginia tuition grant statute was not unconstitutional on its face and that, as administered, the tuition grants are unconstitutional only because they "predominantly maintain" a segregated school. The court said:

> Payment of a tuition grant for use in a private school is legal if it does not tend in a determinative degree to perpetuate segregation. The test is not the policy of the school, but the measure in which the grant or grants contribute to effect the exclusion on account of race. Every exclusive school is not a forbidden school. The part played by the grant in effectuating the exclusion, to repeat, is the pivotal point. It is decisive because the extent of such participation

> determines whether or not the exclusion is State action-the fundamental question here . . . Our determination is simply that the preponderant support of a segregated school may not be rooted in State action. 239 F. Supp. at 565.

Because of the "predominance" test adopted in *Griffin* and in the Civil Rights Act, the Louisiana Commission adopted its resolution limiting grants, after June 1967, to applicants attending schools not "predominantly maintained" by state tuition grants. The Commission argues strongly that, at least from now on, the resolution cures any unconstitutional effect or application of the law.

With deference, we disagree with the criterion the Court applied in *Griffin*. The payment of public funds in any amount through a state commission under authority of a state law is undeniably state action. The question is whether such action in aid of private discrimination violates the equal protection clause.

When state funds predominantly support a private segregated school and when such a school, by congressional act, may be described as a "public school" for certain purposes of the Civil Rights Act of 1964,[16] the state involvement is a *double fortiori* case of unconstitutional state action. But decisions on the constitutionality of state involvement in private discrimination do not turn on whether the state aid adds up to 51 per cent or adds up only to 49 per cent of the support of the segregated institution. The criterion is whether the state is so *significantly* involved in the private discrimination as to render the state action and the private action violative of the equal protection clause. (Here the plaintiffs ask only that the state be enjoined from paying the tuition grants; not that the schools be desegregated.)

The courts have wisely not attempted to devise a formula that would include "significant involvement" in all types of private discrimination. In the Little Rock case the Supreme

Court said, "State support of segregated schools *through any arrangement*, management, funds, or property cannot be squared with the Fourteenth Amendment's command that no State shall deny to any person within its jurisdiction the equal protection of the laws". Cooper v. Aaron, 1958, 358 U.S. 1, 78 S.Ct. 1401, 3 L.Ed.2d 5. In Lee v. Macon County the court said that the State, through tuition grants, may not "induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish". 267 F. Supp. 458. The court in that case, properly we think, focused on the State's approval or sponsorship of private segregated schools. The constitutional odium of official approval of race discrimination has no necessary relation to the extent of the State's financial support of a discriminatory institution. Any aid to segregated schools that is the product of the State's affirmative, purposeful policy of fostering segregated schools and has the effect of encouraging discrimination is significant state involvement in private discrimination. (We distinguish, therefore, state aid from tax benefits, free schoolbooks, and other products of the State's traditional policy of benevolence toward charitable and educational institutions.)

What constitutes significant forbidden involvement may depend on the case. In the exercise of the right to vote, the prohibited involvement may be very slight. In Anderson v. Martin, 1964, 375 U.S. 399, 84 S.Ct. 454, 11 L.Ed.2d 430, a State law required that candidates for office be identified by race on the ballot. The specific act of discrimination took place in the privacy of the ballot box. The State's obvious purpose of fostering discrimination rendered the la winvalid. A unanimous court identified the vice as "the placing of the power of the State behind a racial classification that induces prejudice at the polls". The same principle should apply in the field of education. In the most recent decision in the Girard College ltigation, Commonwealth of Pennsylvania v. Brown,

E.D.Pa. 1967, F.Supp., the court focused on "first, the nature of the state involvement and second, the nature of the institution concerned, be it park, school, or whatever". The court concluded: "where the conscious *purpose* of the State action requires constitutional sanctions".

In Burton v. Wilmington Parking Authority, 1961, 365 U.S. 715, 81 S.Ct. 856, 6 L.Ed.2d 45 the Supreme Court repeated the language from Aaron v. Cooper that "state participation through any arrangement, management, funds or property" is state action. In *Burton* a privately operated restaurant, located within an automobile parking building, refused to serve a Negro. The State's only involvement was that the restaurant owner leased the premises from the Wilmington Parking Authority, a state agency. The governmental agency did not operate, manage, or participate in the operation or management of the restaurant.

In Simkins v. Moses H. Cone Memorial Hospital, 4 Cir. 1963, 323 F.2d 959, cert. den'd. 376 U.S. 938, the court ordered a private hospital to desegregate. The Cone Memorial Hospital was built in 1911 with private funds. It owned and operated facilities having a depreciated cost value of many millions of dollars, and, in addition, had a substantial endowment. In 1954 and again in 1960 the hospital received a total of $1,250,000 in Hill-Burton funds in connection with additions costing $7,350,000. The government funds amounted to about seventeen per cent of the costs of the additions, but were a very much smaller proportion of the total cost of all its facilities. Where there is no evidence of purposeful participation in private discrimination, the percentage of state aid is relevant. But the court emphasized, as we emphasize here, "this is not merely a controversy over a sum of money".

In Mulkey v. Reitman, 1966, 64 Cal. 2d 529, 413 P.2d 825 (1966) the California Supreme Court impliedly held that § 26 of the California constitution was discriminatory be-

cause, by repealing prior legislation forbidding discrimination in housing, the section established an atmosphere conducive to discrimination. The court found that there could be a prohibited state involvement "even where the State can be charged only with encouraging, rather than commanding discrimination". In reaching this result, the court examined § 26 in terms of its "immediate objective", its "ultimate impact", and its "historical context and conditions existing prior to its enactment". The Supreme Court affirmed. Reitman v. Mulkey, May 20, 1967, 35 L.W. 4473. Justice White, for the Court, pointed out: The California Court, "armed with the knowledge of the facts and circumstances concerning the passage and the potential impact of § 26, and familiar with the milieu in which that provision would operate", held that the "purpose and intent of § 26 was to authorize private racial discriminations in the housing market . . . [T]he section would encourage and significantly involve the State in private racial discrimination". Justice Douglas, concurring, put his finger on the crux of the case: "Proposition 14 is a form of sophisticated discrimination whereby the people of California harness the energies of private groups to do indirectly what they cannot under our decisions allow their government to do." Justice Harlan, dissenting, said: "The core of the Court's opinion is that § 26 is offensive to the Fourteenth Amendment because it effectively *encourages* private discrimination". He would approach the "inducement" or "authorization" cases "in terms of the impact and extent of affirmative state governmental activities". Justice Harlan, speaking also for Justices Blark, Clark, and Stewart, said: "the state action required to bring the Fourteenth Amendment into operation must be affirmative and purposeful, actively fostering discrimination. Only in such a case is ostensibly 'private' action more properly labelled 'official' ".

Louisiana's tuition grants "encourage and significantly

involve [Louisiana] in private racial discrimination" more obviously than California was involved through Proposition 14 and § 26. And Justice Douglas's comment applies as aptly to Act 147 of 1962 as it does to Proposition 14. Moreover, the grants meet Justice Harlan's criteria: they are an "affirmative and purposeful" means of "actively fostering discrimination". The purpose of Louisiana's tuition grant program, however, was not just to encourage and not just to authorize private racial discrimination in the field of education. The purpose was to establish and maintain "private" segregated schools.

As the Supreme Court noted in Reitman v. Mulkey, the "Court has never attempted the 'impossible task' of formulating an infallible test for determining whether the State 'in any of its manifestations' has become significantly involved in private discriminations". The facts must be sifted and weighed on a case-to-case basis. The cases in this area of the la wteach, however, that there is no constitutional basis for courts to adopt as a test the predominance of state financial support. The State's only involvement in *Burton* was as lessor. It was very slight in *Simkins*. In Anderson v. Martin and Reitman v. Mulkey, there was no state financial involvement.

In *Griffin* the court warned that private schools receiving tuition grants might be ordered to desegregate. "Continued predominantly State or local government support of the private schools herein maintained might expose some of the defendants to subsequent suit under the [Civil Rights] Act". 239 F. Supp. at 566. In Lee v. Macon County, the court issued a similar warning based on the State's "significant involvement". The court did not refer to the Civil Rights Act definition or to the Griffin test. The court found that Alabama was attempting to "support a separate and private school system for white students". "Moreover, the Governor has officially encouraged private contributions to support the

many private schools throughout the State as alternatives to the public desegregated schol system". The court warned, "if the state persisted, "and if its involvement with the private school system continues to be 'significant', then this 'private' system will have become a state actor within the meaning of the Fourteenth Amendment and will need to be brought under this Court's state wide desegregation order". 267 F. Supp. at 478. Underscoring the meaning of "significant involvement", the court cited Anderson v. Martin, *Burton*, and *Simkins*.

Griffin, one of the cases handed down with *Brown* in 1954, concerned the public schools in Prince Edward County, Virginia. In 1964 the Supreme Court held that the Virginia statute providing tuition grants, when coupled with closing of the public schools, denied Negroes an integrated education. 377 U.S. 218, 84 S. Ct. 1226, 12 L.Ed. 2d 256. "The same reasoning applies when the grants alone deny Negroes an integrated public education by assisting whites to flee to private schools. It is impossible to set a standard as to the number of whites who may leave before the schools become segregated, but state-encouraged departure of any whites tends to create segregation, and it would seem that any state support of segregation violates the equal protection clause." Note, 79 Harv. L.Rev. 841, 843 (1966) discussing *Griffin*. This conclusion is consistent with the principle expressed in Aaron v. Cooper that "State support of segregated schools through any arrangement, management, funds, or property cannot be squared with the [Fourteenth] Amendment." 358 U.S. at 4. And it is consistent with the principle expressed in Lee v. Macon County that the State may not "induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish". 267 F. Supp. at 476.

We summarize.

The system of private segregated schools the State created and nourishes through Act 147 is in a nascent stage. Its

tangible and intangible costs to the State *thus far* are but a drop in the bucket compared with its future costs — should the courts bless the nourishment the private schools receive from the State. The facts this case presents point in only one direction: Unless this system is destroyed, it will shatter to bits the public school system of Louisiana and kill the hope that now exists for equal educational opportunities for all our citizens, white and black.

We hold that the purpose and natural or reasonable effect of Act 147 of 1962 render it unconstitutional on its face. The law was designed to establish and maintain a system of segregated schools. We hold also that Act 147 of 1962 is unconstitutional in its actual effect. The State has predominantly supplied the financial means necessary to establish and maintain the post-1962 private schools and most of the post-1954 private schools in Louisiana. The State is so significantly involved in the discrimination practiced by the private schools in Louisiana that any financial aid from the State to these schools or newly organized schools in the form of tuition grants or similar benefits violates the equal protection clause of the Fourteenth Amendment.

The tuition grants have benefitted certain special schools for handicapped, retarded, and exceptional children. Some of these schools are barely able to exist with the help of tuition grants. But the court cannot rewrite Act 147 so as to provide funds for these schools. That responsibility is the Louisiana Legislature's.

ORDER

In accordance with the findings of fact and conclusions of law in the foregoing opinion,

IT IS HEREBY ORDERED that the defendant Louisiana Financial Assistance Commission, its members, officers, agents, servants, employees and successors in office, and all those who are acting or may act in concert or participation

with them are hereby restrained, enjoined and prohibited from enforcing or seeking to enforce by any means the provisions of Act 147 of the 1962 Session of the Louisiana Legislature.

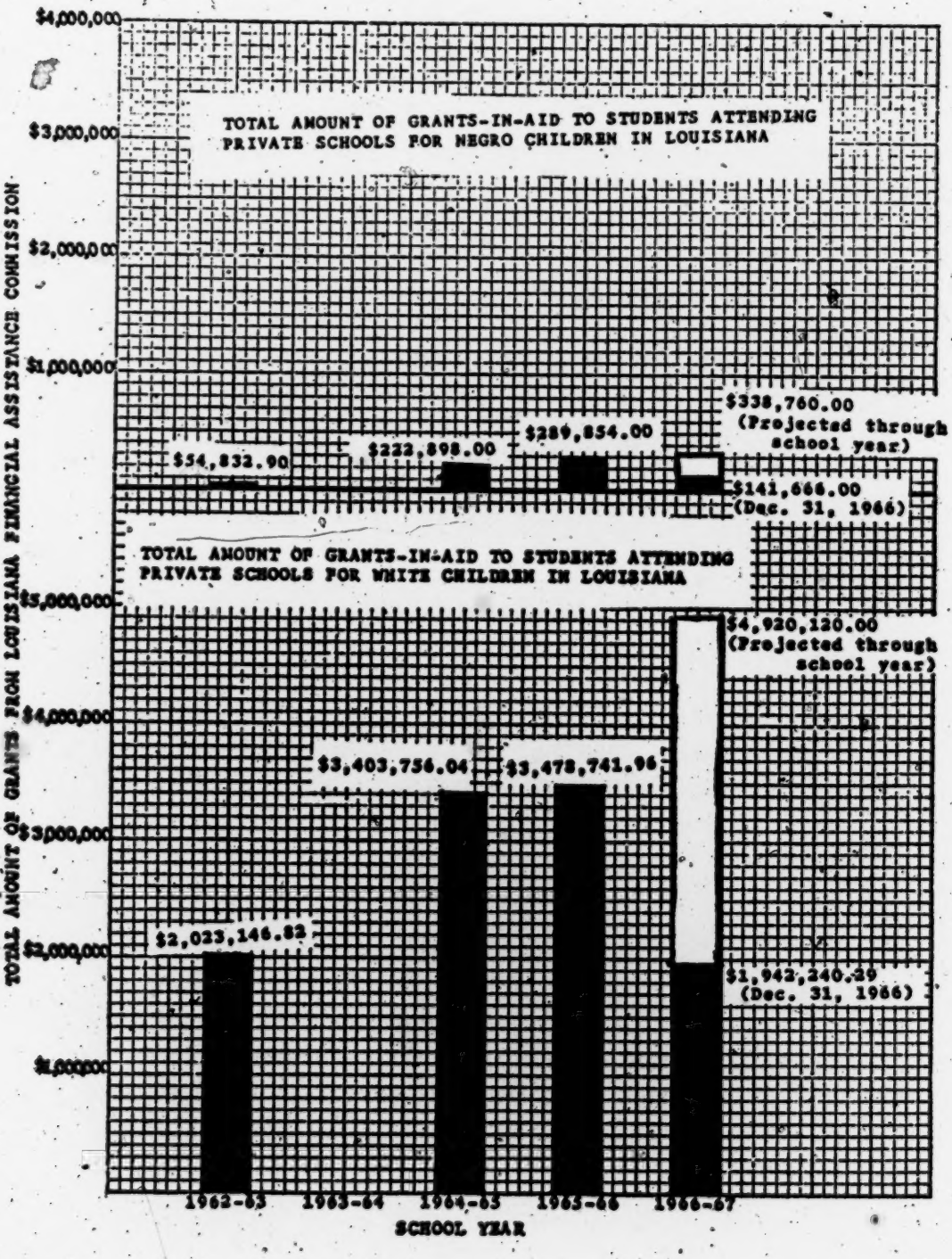
This Court retains jurisdiction of this cause to amend or modify this decree or to issue such further orders as may be necessary and appropriate.

The costs incurred in this proceeding to date are hereby taxed against the defendants.

ORDERED, this 25th day of August, 1967, New Orleans, Louisiana.

/s/ *John Minor Wisdom*
United States Circuit Judge
/s/ *Robert A. Ainsworth, Jr.*
United States Circuit Judge
/s/ *Herbert W. Christenberry*
United States District Judge

APPENDIX A


TOTAL AMOUNT OF GRANTS FROM LOUISIANA FINANCIAL ASSISTANCE COMMISSION
$4,000,000
$3,000,000
$2,000,000
$1,000,000
TOTAL AMOUNT OF GRANTS-IN-AID TO STUDENTS ATTENDING PRIVATE SCHOOLS FOR NEGRO CHILDREN IN LOUISIANA
$54,832.90
$222,898.00
$289,854.00
$338,760.00 (Projected through school year)
$141,666.00 (Dec. 31, 1966)
TOTAL AMOUNT OF GRANTS-IN-AID TO STUDENTS ATTENDING PRIVATE SCHOOLS FOR WHITE CHILDREN IN LOUISIANA
$5,000,000
$4,000,000
$3,000,000
$2,000,000
$1,000,000
$2,023,146.82
$3,403,756.04
$3,478,741.96
$4,920,120.00 (Projected through school year)
$1,942,240.29 (Dec. 31, 1966)
1962-63
1963-64
1964-65
1965-66
1966-67
SCHOOL YEAR

1962-1963

School Category	Total Recipients	Total Grant
White - normal	6,711	$1,992,890.82
White - special	101	30,256.00
Negro - normal	156	32,334.00
Negro - special	125	22,498.00
Total	7,093	$2,077,979.72

1963 - 1964*

	Total Recipients	Total Grant
Total	12,167	$3,594,023.07

1964 - 1965

School Category	Total Recipients	Total Grant
White - normal	10,130	$3,349,418.82
White - special	215	54,337.22
Negro - normal	295	91,870.00
Negro - special	487	131,028.00
Caddo - Bossier**	174	33,789.50
Total	11,301	$3,660,443.54

1965 - 1966

School Category	Total Recipients	Total Grant
White - normal	10,245	$3,390,330.19
White - special	312	88,411.77
Negro - normal	352	124,624.00
Negro - special	594	165,230.00
Caddo-Bossier	187	3,827,241.96
Total	11,690	$3,827,241.96

1966 - 1967
(through December 31, 1966)

School Category	Total Recipients	Total Grant
White - normal	13,845	$1,902,724.83
White - special	286	39,515.46
Negro - normal	391	61,516.00
Negro - special	568	80,150.00
Caddo-Bossier	87	11,122.00
Total	15,177	$2,095,028.29

* A breakdown of these figures for the 1963-1964 school year is not available.

** Caddo-Bossier Association for Retarded Children is treated separately because it is comprised of two units, one for whites and one for Negroes.

BRYAN POINDEXTER, a minor, by LORRAINE POINDEXTER, et al. v. LOUISIANA FINANCIAL ASSISTANCE COMMISSION, et al.
Civil Action No. 14683

FOOTNOTES

1 Other defendants are the Louisiana State Board of Education, the New Parish School Board, and three schools in Orleans Parish, the Ninth Ward Elementary school, the Carrollton Elementary School Association, and the Garden District Academy.

2 LSA-R. S. 17:2901-17:2916. The Court has jurisdiction of this action under 28 U.S.C. §§ 1331, 1343 (3), 2201, and 2281.

3 Under 42 U. S. C. § 2000h-2 (Section 902 of the Civil Rights Act of 1964) and under Fed. R. Civ. P. 24.

4 Under Fed. R.Civ. P. 24.

5 The Court described Act 147 of 1962 as a "refined, sophisticated substitute for the earlier grant in aid program held unconstitutional," and recognized the standing of the plaintiffs "to probe tht purpose, mechanics, and effect of the plan in light of present constitutional standards." 258 F. Supp. 158, 161, 164.

6 On standby is Act 99 of 1967. See Section III C of this opinion.

7 Brown v. Board of Education, 1954, 347 U. S. 483, 74 S.Ct. 686, 98 L.Ed. 873. See Brown v. Board of Education, 1955, 349 U. S. 294, 75 S.Ct. 293, 99 L.Ed. 1083.

8 As in Act 256 of 1958, establishing tuition grants for children conditioned on there being "no racially separate public school" in the parish.

9 The three Commission members originally appointed are Senator E. W. Gravolet, Jr. (Chairman), Representative Lantz Womack (Vice-Chairman), and former State Representative James R. Leake (Secretary). Senator Gravolet, Chairman of the Joint Legislative Committee on Segregation, testified that he played a major role in drafting Act 147 and in sponsoring it in the Legislature.

10 Act 10, 2d Extraordinary Session of 1961, LRS-R. S. 47:318.

11 Act 27 of 1963.

12 See Section V C of this opinion.

13 78 Stat. 241 (1964) 42 U. S. C. § 2000c. Title (Subchapter) IV has two purposes. (1) It authorizes the United States Commission of Education to render technical assistance to public schools in their desegregation problems. (2) § 2000c-6 authorizes the Attorney General to seek an injunction against discrimination by public schools. Section 2000c-8 provides, "Nothing in this sub-chapter shall affect adversely the right of any person to sue for or obtain relief in any court against discrimination in public education.

14 People v. Roberts, 1898, 171 U.S. 658, 19 S.Ct. 58, 43 L.Ed. 323.

15 Heydon's Case, 3 Co. Rep. 7a, 7b, 76 Eng. Rep. 637 (1584. *Cf.* "[T]he most universal and effectual way of discovering the true meaning of a law, when the words are dubious, is by considering the reason and spirit of it; or the cause which moved the legislator to enact it." 1 Blackstone, Commentaries 61 (8th Ed. 1778).

16 Frankfurter, Some Reflections on the Reading of Statutes, 47 Col. L. Rev. 527, 533 (1947).

17 Guinn v. United States, 1915, 238 U.S. 347, 35 S.Ct. 926, 59 L.Ed. 1340.

18 The voter shall be able to (1) "read any clause" in the Constitutions of Louisiana and of the United States and give a reasonable interpretation thereof," or (2) if unable to read, the voter shall be able "to understand and give a reasonable interpretation of any section of either Constitution when read to him by the registrar." La. Const. of 1921, Art. VII, §§ 1(c), 1(d).

19 Fay, The History of Education in Louisiana 69 (Washington; U. S. Bureau of Education, 1898).

20 Porter, The History of Negro Education in Louisiana, 25 La. Hist. Quart. 728, 731 (1942). See also Woodson, The Education of the Negro Prior to 1861, 3-4, 11. The law tolerated private schools for free people of color "by a significant silence on the subject" aided by public opinion. Willey, Education of the Colored Population of Louisiana, 33 Harper's New Monthly Magazine 246 (1866). See also Rousseve, The Negro in Louisiana, 42-55 (New Orleans 1937); Desdunes, Nos Hommes et Notre Histoire (Montreal, 1911).

21 Debates in the Convention for the Revision and Amendment of the Constitution of the State of Louisiana, 3, 33-34 (New Orleans 1864).

22 See Bentley, A History of the Freedman's Bureau (Philadelphia, 1955); Swint, The Northern Teacher in the South, 1867-1870 (Nashville, 1941).

23 Fay, History of Education in Louisiana, p. 107.

Historians, with one exception, agree with Professor Fay. See for example, Harris, The Story of Public Education in Louisiana (New Orleans, 1924) pp 30-31, 51 and Porter History of Negro Education in Louisiana. 25 La. Hist. Quart. 728 (1942). The one exception is Professor Louis R. Harlan, who limited his inquiry to New Orleans in the seventies. In a recent article he concluded that "the New Orleans public schools during the Reconstruction period underwent substantial racial desegregation over a period of six and a half years [1868-1875], an experience shared by no other southern community until after 1954 and by few northern communities at the time." He found evidence that between 500 and 1000 Negroes and several thousand whites attended mixed schools at the height of desegregation (1874). The peak enrollment in New Orleans schools was 26,250 (1875). Harlan, Desegregation in New Orleans Public Schools during Reconstruction, LXVII Am. Hist. Rev. 663 (1962).

In Robert M. Lusher's Report of the State Superintendent of Public Education for 1866, 1-30, there is no mention of Negro education. In that same year Thomas W. Conway testified: "The feeling there is unanimous that they shall not own an acre of land or have any schools. They are more hostile to the establishment of schools than they are to owning lands. They had broken up some of our schools at the time of my departure, and since then I have official reports from those who have charge of the schools that upon the withdrawal of the military from the parishes of St. Mary and Lafourche, the freedmen's school-houses in those parishes were, before night, burnt or pulled down, the schools disbanded, and the teachers frightened away." Report

of Joint Committee on Reconstruction, 1866, Part II, p. 86. Conway, a white officer (Chaplain) with the 79th Regiment of U. S. Colored Infantry, was Commissioner of the Freedman's Bureau in Louisiana, later (1869) State Superintendent of Schools and Chairman of the State Board of Education. In his first report Conway stated: "Compulsory mixed school renders the whole system obnoxious. The law should be amended so as to allow liberty of choice." Report of the Commissioner of Education for the Year 1870, p. 150. The following year he reported "that the former 'slaveholding aristocracy,' who from the first bitterly opposed this plan, now accepted the fact because they could not prevent, and in many instances are now apparently lending their interests and influence cheerfully to the establishment of schools for the colored people, but they do not themselves send—they prefer rather as always before to educate their children in private institutions. . . . As to the poor whites, they refused to apply for admission even though 'good schools, attended by colored children, have flourished right among them for upward of two years'." Annual Report of the State Superintendent of Public Education for the Year 1870 (1871) p. 119-120. Harris writes: "White and negro parents would agree among themselves that only white children would attend certain schools, while only negro children would attend certain other schools; if only one school were provided in a community, the white people would not patronize it . . .; occasionally, separate rooms were provided in the same school for the two races; and now and then, negro children were prevented from attending certain schools, even though such action resulted in breaking up the schools. It seems fairly certain that there were no mixed schools in the country parishes." Harris, The Story of Public Education in Louisiana 78 (New Orleans, 1924).

24 Dr. Barnas Sears, agent of the Fund, answering the State Superintendent's request for funds, wrote, "In the distribution of our fund I should be most happy to cooperate with the State authorities. But I understand that the State public schools [of Louisiana] are so organized that the greater part of the white population are unwilling to send their children to them, and that consequently the benefit of the money goes . . . to the colored children chiefly. . . . It is well known that we are helping the white children of Louisiana, as being the more destitute, from the fact of their unwillingness to attend mixed schools." Conway rejoined: "It will be seen by the letter of Dr. Sears that, owing to the representations made by Mr. Lusher, the Peabody fund, so far as it is employed in Louisiana, is used in opposition to the public-school system of the State. With all respect for the judgment of the agent of the Peabody fund, it may be doubted whether an unwillingness to avail themselves of the advantages offered by the public-school system constitutes in any true sense 'destitution.' While as a fact the number of white children in our public schools is threefold that of children of color; the greater wealth of the white portion of our population enables them to establish and to maintain private schools for their children, and were the number who do derive the advantages of education added to those white children in attendance in our public schools, it would make a number at least quadruple that of all colored children now enjoying school privileges in this State. It is not, therefore, in any sense true that the white children in Louisiana are, 'from the

fact of their unwillingness to attend mixed schools,' the 'more destitute.' The administration of the Peabody fund on the basis of such a supposition has a tendency to foster the evil which deprecates, inasmuch as it rewards by its benefactions those who refuse to gain an education unless it is obtained in harmony with the spirit of caste; while, on the other hand, by providing educational facilities for white children, it enables the opponents of the public-school system to deny school facilities to the colored children without involving the others in the loss and injury inflicted."." Report of January 30, 1871. Both are quoted in Fay, pp. 106, 107.

25 Fay, History of Education of Louisiana, 107. "Redemption" of Louisiana was part of the Hayes-Tilden compromise in 1876.

In Bertonneau v. Board of Directors of City Schools, Fed. Case No. 1361, 3 Fed. Cas. 294, 3 Woods, 177 (Circuit Court, D.La., 1878) the court held that a city ordinance segregating schools in New Orleans was not a denial of equal protection where the public schools were of equal excellence for all children.

26 Woodward, The Strange Carter of Jim Crow (2nd Rev. Ed. 1966).

27 The language beginning "This provision . . ." was added.

28 The New Orleans Times-Picayune, December 5, 1960.

29 The New Orleans Times-Picayune, December 18 ,1960.

30 The New Orleans Times-Picayune, December 22, 1960.

31

32 The New Orleans Times-Picayune, August 1, 1962.

33 The New Orleans Times-Picayune, August 1, 1962.

34 De Lesseps Morrison, then Mayor of New Orleans, candidate for Governor in the Democratic run-off primary.

35 New Orleans Times-Picayune, December 5, 1963.

36 New Orleans Times-Picayune, March 11, 1962.

37 *Id.*

38 New Orleans Times-Picayune, November 9, 1962.

39 Jenkins v. City of Bogalusa School Board, Conley v. Calcasieu Parish School Board, United States v. Caddo Parish School Board, Davis v. East Baton Rouge Parish School Board, George v. East Feliciana Parish School Board, Dandridge v. Jefferson Parish School Board, Bush v. Orleans Parish School Board, United States v. Plaquemine Parish School Board, Smith v. St. Tammany Parish School Board.

40 One school, which charges the highest tuition in the State, Newman School in New Orleans, established in 1903, publicly announced that it will accept qualified students without regard to race. Dr. Isabel French, the principal of New University School, a post-1962 school, testified that she had intended adopting an open policy; Newman had "beaten her to it."

41 Before adoption of its resolution of October 29, 1967.

42 See footnote 40.

43 See footnote 40.

44 Stopulation, March 30, 1967.

45 Ala. Acts 1956, Spec. Ses; Act 82. p. 119.

46 See footnote 13.

COMMISSION EXHIBIT NO. 7

MINUTES OF THE LOUISIANA FINANCIAL ASSISTANCE COMMISSION AUGUST 9, 1962

The first meeting of the Louisiana Financial Assistance Commission was held on August 9, 1962, in the office of the Speaker of the House of Representatives in the State Capitol Building. Senator E. W. Gravolet was present and submitted his credentials which had been duly filed with the proper Clerk of Court. Representative Lantz Womack was present and submitted his credentials which had been duly filed with the proper Clerk of Court. Representative James R. Leake was present and submitted his credentials which had been duly filed with the proper Clerk of Court.

The three-member Commission therefore consisted of Mr. E. W. Gravolet, Mr. Lantz Womack, and Mr. James R. Leake. Also present at the meeting were Mr. Woods and Mr. Fountain, each of whom was acting in an advisory capacity to the Commission.

Mr. Leake made a motion that, inasmuch as this was the initial meeting of the Commission, the members proceed with the election of officers. The motion was seconded by Mr. Womack and was passed unanimously.

The Commission declared itself open for nominations for the post of Chairman. Mr. Leake nominated Mr. E. W. Gravolet. The nomination was seconded by Mr. Womack. Mr. Womack moved that the nominations be closed and that Mr. Gravolet be accepted by acclamation. Mr. Leake seconded the motion. The motion was carried unanimously.

Mr. Gravolet assumed the chair and declared nominations were open for Vice Chairman. Mr. Leake nominated Mr. Lantz Womack for Vice-Chairman. The motion was seconded by Mr. Gravolet. Mr. Gravolet moved that the nominations be closed and that Mr. Womack be accepted by acclamation. Mr.

Leake seconded the motion and it was carried unanimously. Mr. Womack was elected to the post of Vice-Chairman.

Mr. Gravolet declared nominations open for Secretary. Mr. Womack nominated Mr. Leak for Secretary. The nomination was seconded by Mr. Gravolet. Mr. Womack moved that the nominations be closed and that Mr. Leake be accepted by acclamation. The motion was seconded by Mr. Gravolet and was passed unanimously. Mr. Leake was elected to the post of Secretary.

Mr. Womack made a motion that the Commission request Mr. Red Wood, who was present, to interpret Act 147 for the benefit of the members. This motion was seconded by Mr. Leake and carried unanimously. Mr. Wood then gave his interpretation of Act 147.

Mr. Wood explained that Act 147 gave the Commission the authority to pay grants to children in attendance in private non-sectarian elementary or secondary schools. He also stated that the Commission had the authority to establish the amount of the grants to be paid to each of these students and the method under which the grants would be paid.

Mr. Leake asked Mr. Wood if the Commission had the power not to pay grants to Negro students. Mr. Wood replied that the Commission had the authority to pay or to refuse to pay any student.

Senator Gravolet stated that, if the Commission was going to operate in accordance with the U.S. Constitution that the Commission should sho wno discrimination in the approval of grants because of race, creed, or color.

Mr. Womack made a motion that "the policy of the Louisiana Financial Assistance Commission shall be to honor all applications for grants without regard to race, creed, or color." The motion was seconded by Mr. Leake and carried unanimously.

Mr. Leake stated that inasmuch as the Commission had

the authority to establish the amount of the grant, the cost of educating children in the public schools should be taken into consideration. He further requested that Mr. Byron Benton of the State Department of Education be contacted in order to ascertain the total cost of educating children in the State of Louisiana.

Mr. Benton was contacted and informed the Commission that the average cost of educating children in the State was a little in excess of $360.00 per school year.

Mr. Leake stated that it was the duty of the Commission to establish the amount of the financial assistance grant as provided in Act 147. He made a motion that the Commission establish $2 per school day, or $360.00 per 180-day school term, as the financial assistance to be provided students attending private non-sectarian elementary and secondary schools in the State of Louisiana. The motion was seconded by Mr. Womack and was passed unanimously.

Mr. Womack made a motion that the grant be paid on a monthly basis as determined by the number of school days in the preceding month. The motion was seconded by Mr. Leake and was passed unanimously.

Mr. Womack made a motion that the Commission request Mr. James D. Fountain to prepare applications to be completed by applicants for submission to the Commission. Mr. Leake seconded the motion and it was carried unanimously.

Mr. Fountain was recognized by the Chairman and he stated that he had already completed a form, which if acceptable to the Commission, could be printed and sent out. He submitted a rough draft of the form to the Commission. *After analyzing the application form, Mr. Womack made a motion that the Commission delete from Section 2 of the application that section entitled "Race....." He emphasized that if the policy of the Commission was to approve grants without regard to race, creed, or color, there was no need to ascertain*

the race of any applicant. The motion was seconded by Mr. Leake and carried unanimously.

Mr. Leake made a motion that the application form submitted by Mr. Fountain be accepted after the removal from Section 2 the word "Race." The motion was seconded by Mr. Womack and carried unanimously.

The Chairman called for any additional business. There was none. Mr. Leake made a motion to adjourn; the motion was seconded by Mr. Womack and carried unanimously.

The Chairman informed the Commission that a meeting would be held the next day, August 10, 1962, at 10:00 a.m. in Room 202 of the Capitol Annex.

I, James R. Leake, Secretary of the Louisiana Financial Commission, do hereby certify that the above and foregoing minutes are correct to the best of my knowledge.

/s/ *James R. Leake*
Secretary.

I, George K. Broadway, Jr., being the Director of the Louisiana Financial Assistance Commission, do hereby certify and attest to the fact that this is a true reproduced copy of the minutes dated August 9, 1962 and in the files of this Commission.

/s/ *George K. Broadway, Jr.*
Director

COMMISSION EXHIBIT No. 8

MINUTES OF THE LOUISIANA FINANCIAL ASSISTANCE COMMISSION
OCTOBER 17, 1963

A meeting of the Louisiana Financial Assistance Commission was held on October 17, 1963. The Chairman, Senator E. W. Grayolet, Jr., called the meeting to order. Mr. Womack moved to dispense with the reading of the minutes of the previous meeting; Mr. Leake seconded the motion.

Mr. Fountain informed the Commision that he had re-

ceived applications from students in attendance at the Boyd School located in New Orleans. He stated that he and Mr. C. C. Wood were of the opinion that the Boyd School was private, non-sectarian in keeping with the provisions set forth in Act 147 of 1962.

Mr. Fountain stated that there was a question, however, which must be answered by the Commission. He stated that he had investigated the Boyd School in New Orleans and found it to be an integrated school. He stated that all of the students were colored, however, the teacher was white. He stated that Mr. Boyd and all other administrative personnel of the school seemed to be colored. The white teacher's name is Miss Carla Burgess. She is supposed to have a degree from the Dominican College. Mr. Fountain said that he felt that the Commission members should be kept informed and should, at this time, decide on approving or disapproving the applications from the Boyd School.

Mr. Womack stated that inasmuch as it was the stated policy of the Commission not to discriminate against any applicant because of race, creed, or color, he could not see how this Commission could discriminate against any applicant because of the race, creed, or color of the teacher. Mr. Womack then made a motion that the applications received from children attending the Boyd School be approved. Mr. Leake seconded the motion, with the comment that freedom-of-choice grants should be available to all children whether the child is in a segregated or integrated school. The motion carried unanimously.

Mr. Fountain told the Commission that he felt that the JUNO schools were heading for financial trouble. The Commission instructed Mr. Fountain to keep close watch over the situation, but not to forget that the Commission was in business to pay a tuition grant to the child and not to worry about the financial difficulties of any school.

There being no further business, Mr. Womack moved that the meeting be adjourned; Mr. Leake seconded the motion. There being no opposition, the meeting was adjourned.

I, James R. Leake, Secretary of the Louisiana Financial Assistance Commission, do hereby certify that the above and foregoing minutes are true and correct to the best of my knowledge.

/s/ *James R. Leake*
Secretary

I, George K. Broadway, Jr., being the Director of the Louisiana Financial Assistance Commission, do hereby certify and attest to the fact that this is a true reproduced copy of the minutes dated October 17, 1963 and in the files of this Commission.

/s/ *George K. Broadway, Jr.*
Director

Commission EXHIBIT No. 6

RESOLUTION

BE IT RESOLVED, Act 147 of 1962 confides to the Louisiana Financial Assistance Commission the duty to determine and pay the amount of financial assistance to be made available to each applicant for financial assistance to students attending private schools, not to exceed the obligation actually incurred by the applicant, and the Commission has concluded that, except with respect to applicants on behalf of children attending private schools for retarded children, it will not pay tuition grants to applicants whose children attend any private school predominately maintained through such tuition grants. In order to avoid unnecessary disruption of the present classes with consequent injury to the students, this policy shall be effective for school sessions commencing after June 1967.

I, James D. Fountain, Assistant Director, do hereby certify that the above resolution is a true and correct copy adopted at a meeting held October 29, 1966.

/s/ *James D. Fountain*
Assistant Director

I, George K. Broadway, Jr., being the Director of the Louisiana Financial Assistance Commission do hereby certify and attest to the fact that this is a true copy of the Resolution recorded in the minutes of this Commission dated October 29, 1966.

/s/ George K. Broadway, Jr.
Director

UNITED STATES OF AMERICA
STATE OF LOUISIANA
WADE O. MARTIN, JR.

I, the undersigned Secretary of State, of the State of Louisiana do hereby certify that the annexed and following pages are a true and correct copy of Act No. 147 of the 1962 Regular Session of the Louisiana Legislature, as shown by comparison with the original document on file in this office.

In testimony whereof, I have hereunto set my hand and caused the Seal of my Office to be affixed at the City of Baton Rouge on, this the 14th day of March, 1967.

Wade O. Martin, Jr.
Secretary of State

ACT NO. 147

HOUSE BILL
NO. 1124

BY: MESSRS. FIELDS, LEHMANN, TRICHE, GARRETT, STINSON, SCHOENBERGER, DUPONT AND NAPPER AND SENATORS GRAVOLET, PATTON, JONES, CARPENTER AND ADCOCK

AN ACT

To declare the public policy of the State of Louisiana in regard to encouraging the education of all of the school children of the state; to create as a body politic and corporate the Louisiana Financial Assistance Commission; to provide for the membership of said Commission; to define the duties, powers and functions of said Commission;

ORIGINATED
IN THE
HOUSE OF REPRESENTATIVES

W. Clegg Cole
Clerk of the House of Representatives

Rec'd. by the Governor, July 3, 1962 at 9:50 a.m. D. Andries
Received by Secretary of State this 10th day of July, 1962,
Wade O. Martin, Jr., Secretary of State.

HOUSE BILL
NO. 1124

BY: MESSRS. FIELDS, LEHMANN, TRICHE, GARRETT, STINSON, SCHOENBERGER, DUPONT AND NAPPER AND SENATORS GRAVOLET, PATTON, JONES, CARPENTER AND ADCOCK

AN ACT

To declare the public policy of the State of Louisiana in regard to encouraging the education of all of the school children of the state; to create as a body politic and corporate the Louisiana Financial Assistance Commission; to provide for the membership of said Commission; to define the duties, powers and functions of said Commission; to authorize said Commission to make and pay grants of financial assistance from the funds of said Commission for the education of the school children of the state in private non-sectarian elementary and secondary schools in the state; to prescribe standards of eligibility for such financial assistance; to provide a procedure for making application for such financial assistance and for the approval or disapproval of same; to provide for judicial review of the actions of the Commission in the event of disapproval of an application for such financial assistance; to provide that any person who shall knowingly swear or affirm falsely to any matter or thing

required by the terms of this Act shall be guilty of false swearing and to provide penalties therefor; to provide that any person accepting any payment authorized by this Act with knowledge that the child for whose benefit the payment is received was not actually a bona fide student at a private non-sectarian elementary or secondary school during the period for which payment is received, shall be guilty of a misdemeanor and prescribing penalties therefor; to provide that the funds in the Education Expense Grant Fund in the State Treasury shall be transferred to the Louisiana Financial Assistance Fund; to provide that the Two Hundred Thousand ($200,000) Dollars per month dedicated to the Education Expense Grant Fund by Act 10 of the Second Extraordinary Session of 1961, R.S. 47:318, as amended, shall be deposited in the Louisiana Financial Assistance Fund as said Two Hundred Thousand ($200,000) Dollars per month reaches the State Treasury; to create and establish in the State Treasury the Louisiana Financial Assistance Fund; to repeal Act 3 of the Second Extraordinary Session of 1960; and to repeal all laws or parts of laws in conflict with this Act. Be it enacted by the Legislature of Louisiana:

Section 1. That the Legislature of Louisiana, mindful of the need for a literate and informed citizenry, and being desirous of advancing the cause of education generally, hereby declares that it is the policy of this state to encourage the education of all the children of Louisiana. In furtherance of this objective, and to afford each individual freedom in choosing public or private schooling, the Legislature finds that it is desirable and in the public interest that financial assistance should be provided from the public funds of the state for education of the children in private non-sectarian elementary or secondary schools in this state.

Section 2. That there is hereby created, established and

constituted, as a body politic and corporate, the Louisiana Financial Assistance Commission, hereinafter sometimes referred to as the "Commission," which shall be composed of three members to be appointed by the Governor; provided, that members of the Legislature may be appointed and any legislator so appointed shall be exempt from the provisions of Section 137 of Title 14 of the Louisiana Revised Statutes of 1950, as last amended by Act 291 of 1956; and, provided further, that there shall be one member from each of the three Louisiana Public Service Districts.

One member of said Commission shall be appointed for a term of two years, one for a term of four years, and one for a term of six years, and members shall continue in office until their successors are appointed and qualified; and the Governor shall have the right to fill any vacancy among the membership of said Commission, whether such vacancy shall occur by death, resignation, or otherwise, but every appointment made to fill such vacancy shall be only for the unexpired portion of the term of the member inrespect to whom the vacancy occurred.

The members shall serve without pay, but they shall be entitled to reimbursement of actual expenses incurred while on the business of the Commission, when such business has been authorized by the Commission, to be paid out of the funds of the Commission, on the warrant of the Chairman, attested by the Secretary.

Section 3. The Commission shall have authority to adopt such by-laws, rules and regulations for the orderly transaction of its own business as it may deem necessary and appropriate, not inconsistent with the provisions of this Act, and shall select from its own members a Chairman and a Vice-Chairman, the latter to act as Chairman in the absence of the elected Chairman.

Two members of the Commission shall constitute a

quorum for the transaction of business, and meetings of said Commission shall be held upon call by the Chairman or Vice-Chairman at such time and place as may be designated after notice to the other members.

The Commission shall have authority to select, employ and fix the compensation of a Director, who shall be the chief executive officer of the Commission, and a Secretary, whose duty it shall be to preserve a record of all business transacted by the Commission and to perform such other duties as the Commission may designate. It may appoint, retain and discharge such legal, secretarial, clerical and other personnel as it may consider necessary and requisite for the efficient transaction of its business, and shall have authority to fix the compensation of such personnel, not inconsistent with the constitutional provisions pertaining to Civil Service and the competent rules and regulations adopted pursuant thereto.

Section 4. The Commission is hereby declared to be a public corporation of the State of Louisiana, domiciled in the Parish of East Baton Rouge, invested with all powers, privileges, rights and immunities conferred by law upon other corporations of like character within the state. It shall have and possess the authority to sue and be sued. All legal process shall be served upon the Chairman or Vice-Chairman, personally, of the Commission, in their official capacity.

Section 5. Pursuant to the power and authority herein conferred, the Commission is authorized and empowered:

A. To receive and administer all funds now or hereafter appropriated to, provided for, or otherwise accruing to the Louisiana Financial Assistance Fund, hereinafter created, for the purpose of providing financial assistance to students attending private non-sectarian elementary and secondary schools in this state; for the purpose of defraying the cost of the Commission's operations; and for any and all purposes necessary or proper for the administration of the provisions

of this Act. For purposes of this article, a private non-sectarian elementary or secondary school is defined as a school whose operation is not controlled directly or indirectly by any church or sectarian body or by an individual or individuals acting on behalf of a church or sectarian body.

B. To prescribe standards, within the limitations hereinafter imposed, for qualification for such assistance, which standards shall be as follows:

Applicants must:

(1) Be eligible under the laws of the State of Louisiana for admission to elementary or secondary schools within the public school system of the State of Louisiana.

(2) As often as the Commission might, in its discretion, require it, furnish a certificate, on any form satisfactory to the Commission of immunization from contagious or communicable diseases, innoculation* against which would protect the school children of the state and the public health; and,

(3) Furnish satisfactory evidence of admissibility to a private non-sectarian elementary or secondary school in this state, legally constituted and operated under the Constitution and laws of the State of Louisiana.

C. To establish such municipal, parish or area offices, under the jurisdiction of the Commission, and to staff the same, as may be necessary to discharge the duties and functions imposed by this Act.

D. To determine and pay the amount of the financial assistance to be made available to each applicant, and in so doing to prescribe classifications of applicants according to grade in school and courses pursued, and to take into account the expenses of the applicant, and no financial assistance shall exceed the obligation actually incurred by the applicant; provided, however, that all applicants having the same classification shall receive equal financial assistance.

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* As it appears in the enrolled bill.

E. To prescribe standard forms of applications and related documentary evidence for financial assistance, as authorized by the provisions of this Act, and the Commission may require that such applications and evidences be submitted under oath or affirmation by the parent or guardian of, or the person standing in loco parentis to, any child for whom application is made.

F. Each application shall specify the number of days for which the financial assistance is requested, but in no event shall any one application be for more than 180 days within any one calendar year. Subsequent applications may be filed on behalf of any child who continues to meet the standards and requirements herein prescribed or as may be fixed by the Commission within the limitations imposed by this Act.

G. Upon approving the application for financial assistance the Commission shall issue its commitment in writing to the parent or guardian of, or person standing in loco parentis to, the applicant, which said commitment shall be for a specified number of days, and for a specified amount for each day, but no commitment shall be for a period in excess of 180 days within a calendar year. Payments made under such commitment shall be made by the Commission, in accordance with the terms of the commitment, and each commitment shall be conditioned upon the applicant's attendance in accordance with his application and the provisions of this Act.

H. In the event of disapproval by the Commission of an application for financial assistance payable from Commission funds, the Commission shall give notice to the applicant, through the parent or guardian of, or person standing in loco parentis to, the applicant, by certified mail, and any applicant, through the parent or guardian of, or the person standing in loco parentis to, the applicant, may within ten days after receipt of such notice apply to such Commission for a hearing, and shall be given a prompt and fair hearing on the

question of entitlement to such financial assistance. The Commission shall render prompt decision upon such hearing, and if the Commission shall affirm its previous action of disapproval of the application, notice shall be given to the applicant, through the parent or guardian of, or the person standing in loco parentis to, the applicant, by certified mail, and any applicant aggrieved by the action of the Commission may, through the parent or guardian of, or the person standing in loco parentis to, the applicant, within ten days after receipt of such notice, file a petition in the Nineteenth Judicial District Court, in and for the Parish of East Baton Rouge, State of Louisiana, for a hearing in the matter on all questions of fact and of law. The petition shall be served upon the Chairman or Vice-Chairman of the Commission as prescribed by this Act. Within thirty days after service of the petition the Commission shall prepare and deposit a certified transcript of the record in the case in the office of the Clerk of the Nineteenth Judicial District Court, in and for the Parish of East Baton Rouge, which record shall include a copy of the application and any official findings, orders and rulings of the Commission in the case.

The Commission shall have thirty days after service of the petition within which to appear and file exceptions, answers or other pleadings. Additional time for preparation of the certified transcript of the record, and for appearing and filing exceptions, answers or other pleadings, may be granted to the Commission by order of any judge of said District Court. The Court, after considering the law, the pleadings and such evidence as may be adduced in the case, may modify, affirm or reverse the findings of the Commission and make, isue and enter its judgment accordingly. Appeal from any such judgment shall be subject to the procedures applicable to appeals in ordinary civil actions.

I. All payments made in accordance with any commitment issued by the Commission shall be by check to the parent or

guardian of, or the person standing in loco parentis to, the applicant. The private non-sectarian elementary or secondary school attended shall furnish, upon forms prescribed by the Commission, as often as the Commission shall require it, sworn certificates, signed by the Director or other appropriate official of said elementary or secondary school, showing the number of days actually attended by the applicant, and assigning reasons for any reported absences.

An applicant is deemed to be in attendance within the meaning of this Section, although temporarily absent due to illness or other good cause, so long as such applicant is enrolled in the private non-sectarian elementary or secondary school as a bona fide enrollee.

Section 6. Any person who shall knowingly make any false affidavit or shall knowingly swear or affirm falsely to any matter or thing required by the terms of this Act to be sworn or affirmed to, shall be guilty of false swearing, and upon conviction shall be punished by a fine and imprisonment as other persons guilty of false swearing.

Section 7. That it shall be unlawful for any parent or guardian, or a person standing in loco parentis to a child, to accept any payment authorized by this Act knowing that the child for whose benefit the payment is received did not actually attend, or was not actually a bona fide student at a private non-sectarian elementary or secondary school during the period for which payment is received. Any person violating this Section shall be guilty of a misdemeanor and upon conviction shall be punished by imprisonment in the parish jail for not more than one year or by a fine of not more than Five Hundred ($500.00) Dollars, or by both such fine and imprisonment.

Section 8. That the Two Hundred Thousand ($200,000) Dollars per month dedicated to the Education Expense Grant Fund by Act 10 of the Second Extraordinary Session of 1961,

R.S. 47:318, as amended, shall be deposited in the Louisiana Financial Assistance Fund as said Two Hundred Thousand ($200,000) Dollars per month reaches the State Treasury, and the State Treasurer be and he is hereby authorized and directed to transfer said Two Hundred Thousand ($200,000) Dollars per month to the Louisiana Financial Assistance Fund as soon as said Two Hundred Thousand ($22,000) Dollars per month reaches his office and to continue to transfer said Two Hundred Thousand ($200,000) Dollars per month, from month to month. The State Treasurer is further authorized and directed to transfer all of the funds contained in the Education Expense Grant Fund, upon the effective date of this Act, to the Louisiana Financial Assistance Fund.

Section 9. The Louisiana Financial Assistance Commission is hereby vested with all powers necessary or convenient to carry out the purpose of this Act and this Act shall be liberally construed to that end.

Section 10. The several provisions, sentences, sections, clauses, phrases or other parts of this Act shall be held by any court to violate any of the provisions of the Constitution of the State of Louisiana or of the United States of America, such decision shall not be construed as invalidating any other provision, sentence, section, clause, phrase or other part of this Act not held unconstitutional.

Section 11. That all laws or parts of laws in conflict herewith be and the same are hereby repealed only to the extent of such conflict. Act 3 of the Second Extraordinary Session of 1960 is hereby repealed.

/s/ *V. M. Delaney*
Speaker of the House of Representatives
/s/ C. *C. Aycock*
Lieutenant Governor and
President of the Senate
/s/ *J. H. Davis*
Governor of the State of Louisiana

Approved: July 7, 1962

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 793

LOUISIANA FINANCIAL ASSISTANCE COMMISSION, ET AL., APPELLANTS

v.

BRYAN POINDEXTER, ET AL., AND UNITED STATES OF AMERICA, APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

MOTION TO AFFIRM

Pursuant to Rule 16(1)(c) of the Rules of this Court, the United States moves that the judgment of the district court entered on August 26, 1967, be affirmed.

OPINIONS BELOW

The opinion of the three-judge district court supporting the decree from which this appeal is taken (J.S. A17–A63) is not yet reported. A prior opinion of district court in this cause (J.S. A1–A16) is reported at 258 F. Supp. 158.

284-032—67

JURISDICTION

The decree of the three-judge district court (J.S. A17–A63) was entered on August 26, 1967. A notice of appeal was filed on September 8, 1967. The Jurisdictional Statement was filed on November 6, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. § 1253.

QUESTION PRESENTED

Whether the district court was correct in holding that the Louisiana statutes providing financial aid for tuition to attend private schools denied Negro children the equal protection of the laws.

STATEMENT

This is an appeal from a final judgment entered by a three-judge district court in the Eastern District of Louisiana, convened pursuant to 28 U.S.C. § 2281, holding invalid Act 147 of the 1962 Session of the Louisiana Legislature (L.S.A.–R.S. §§ 17:2951–2959). That statute authorizes State financial assistance to students attending private, non-sectarian elementary and secondary schools in Louisiana and establishes the Louisiana Financial Assistance Commission to administer the aid program.

The original complaint was filed on June 29, 1966, as a class action on behalf of Negro school children in Louisiana. The plaintiffs sought to enjoin "the enforcement, operation, and execution of [the Louisiana tuition grant statutes] by restraining certain officers of the State of Louisiana from the enforcement or execution of such statutes on the ground of the unconstitutionality of such statutes under the Constitution of

the United States." It was alleged that enforcement of the statute worked a denial of the equal protection of the laws on the basis of race in violation of the Fourteenth Amendment. Named as defendants were the Louisiana Financial Assistance Commission, the Louisiana State Board of Education, the Orleans Parish School Board, and the officers and members of each, and three private schools to which the plaintiffs had been denied admission.[1]

In response to this complaint, the defendants filed a motion to dismiss on the ground that the plaintiffs lacked standing to sue in that they sought only to enjoin the disbursement of public funds to students attending segregated schools and did not attack the constitutionality of the statute. The defendants also challenged the convening of a three-judge court. The district court overruled these objections in an opinion filed August 3, 1966 (J.S. A1–A16). The court *held* that "the plaintiffs have standing to sue, and to probe 'the purpose, mechanics, and effect of the plan' in light of present constitutional standards" (J.S. A10). On October 19, 1966, the United States filed its motion for leave to intervene as a party plaintiff pursuant to Section 902 of the Civil Rights Act of 1964 (42 U.S.C. 2000h–2) and Rule 24 of the Federal Rules of Civil Procedure.[2] The government alleged that Act 147 had

[1] The private schools were subsequently dismissed as parties defendant on the motion of the plaintiffs.

[2] Defendants objected to this intervention on the ground that it sought to have the statute declared unconstitutional on its face whereas the private plaintiffs had only asserted its unconstitutional application. This objection was overruled by the court.

been designed to provide segregated schools for white pupils and that its operation had resulted in the establishment of a state-supported segregated school system in the State of Louisiana in violation of the equal protection clause of the Fourteenth Amendment.

After a full hearing on the merits, the district court, on August 25, 1967, rendered its decision holding Act 147 unconstitutional and enjoining its further enforcement and execution (J.S. A17–A57). The court found that "[t]he purpose and natural or reasonable effect of this law are to continue segregated education in Louisiana by providing state funds for the establishment and support of segregated, privately operated schools for white children," and concluded that Act 147 violates the Equal Protection Clause because it constitutes "affirmative and purposeful state aid promoting private discrimination" (J.S. A19, A20).

In reaching its decision on the constitutionality of Act 147, the district court initially considered the purpose of that Act "in the light of its history and present setting." After tracing the early history of public education in Louisiana, the court focused on State legislative action after the first *Brown* decision in 1954, commenting that, "[a]s fast as the courts knocked out one school law, the legislature enacted another." Specifically, the court stressed that two of these invalidated statutes embodied tuition grant schemes "designed to provide a state-supported sanctuary for white children in flight from desegregated public schools" (J.S. A23, A19).[3]

[3] Act 258 of 1958 (L.S.A.–R.S. § 17:391.1–391.16) provided for tuition grants to "children attending non-sectarian non-

Although the court found that "the tuition grants have supplied a heavy predominance of funds needed to establish and maintain post-1954 and especially post-1962 private segregated schools," it was urged to save the statute for the future in light of a recent resolution adopted by Louisiana Financial Assistance Commission limiting grants, starting in June 1967, to applicants attending schools not "predominantly maintained" by these grants. That argument was premised on the "predominance" test used by the three-judge court in *Griffin* v. *State Board of Education*, 239 F. Supp. 560 (E.D. Va., not appealed), and the definition of a "public school" contained in Title IV of the Civil Rights Act of 1964. In rejecting this suggestion, the district court stated (J.S. A50–A51):

> When state funds predominantly support a private segregated school and when such a school, by congressional act, may be described as a "public school" for certain purposes of the Civil Rights Act of 1964, the state involvement

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public schools," provided there were "no racially separate public school" in the parish. This blatantly discriminatory statute was repealed in 1960 by Act 3 of the Second Extraordinary Session of 1960 (L.S.A.–R.S. § 17:2901 *et seq.*) which substituted a less openly discriminatory tuition grant system. This second statute was declared unconstitutional in *Hall* v. *St. Helena Parish School Board*, 197 F. Supp. 649, affirmed *per curiam*, 368 U.S. 515. The case now before this Court represents the third grant statute and, as the district court noted, a fourth statute was enacted to take effect when Act 147 was invalidated—an eventuality that apparently was expected. The execution of this fourth statute has now been enjoined pending a determination of its constitutional validity in a subsequent proceeding before the district court in this case.

is a *double fortiori* case of unconstitutional state action. But decisions on the constitutionality of state involvement in private discrimination do not turn on whether the state aid adds up to 51 per cent or adds up only to 49 per cent of the support of the segregated institution. The criterion is whether the state is so *significantly* involved in the private discrimination as to render the state action and the private action violative of the equal protection clause. (Here the plaintiffs ask only that the state be enjoined from paying the tuition grants; not that the schools be desegregated.)

* * * Any aid to segregated schools that is the product of the State's affirmative, purposeful policy of fostering segregated schools and has the effect of encouraging discrimination is significant state involvement in private discrimination. (We distinguish, therefore, state aid from tax benefits, free schoolbooks, and other products of the State's traditional policy of benevolence toward charitable and educational institutions.) [Emphasis and parentheses in original.]

ARGUMENT

The district court was correct in holding that the Louisiana tuition grant statute denied Negro school children in that State the equal protection of the laws guaranteed by the Fourteenth Amendment.[4] The court

[4] The appellants cite as error the refusal of the court below to dismiss the complaint, and complaint in intervention, on the ground of the lack of standing of the complaining parties. The right of Negro children to complain is established by their interest as public school age children in a meaningfully desegregated public education system which is directly affected by Act 147. See *e.g.*, *Abington School District* v. *Schempp*,

followed accepted standards for determining constitutionality when it considered the purpose of the statute and found that it was one of creating and maintaining a system of segregated schools in which white pupils could find a refuge from the desegregation of public schools. In reaching this determination, the court quite properly considered the historical setting of Act 147 as part of the context of facts and circumstances surrounding its enactment. See, *e.g.*, *Grosjean* v. *American Press Co.*, 297 U.S. 233; *Miller* v. *City of Milwaukee*, 272 U.S. 713; and especially *Griffin* v. *School Board of Prince Edward County*, 377 U.S. 218, 231; *Cooper* v. *Aaron*, 358 U.S. 1; *Louisiana* v. *United States*, 380 U.S. 145. The context clearly revealed that the statute was but one of the more recent in a long line of enactments by the Louisiana legislature directed at insuring a system of segregated schools. Specifically, the evidence disclosed that Act 147 was simply a more sophisticated substitute measure designed to replace the earlier tuition grant statute held unconstitutional in *Hall* v. *St. Helena Parish School Board*, 197 F. Supp. 649, affirmed *per curiam*, 368 U.S. 515.[5]

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374 U.S. 203, 224; *McCollum* v. *Board of Education*, 333 U.S. 203, 206. The standing of the United States is settled by Title IX of the Civil Rights Act of 1964 (42 U.S.C. § 2000h–2), which clearly authorizes it to raise all issues not foreign to the original action. See, *e.g.*, *Stewart-Warner Corp.* v. *Westinghouse Electric Corp.*, 325 F. 2d 822 (C.A. 2), certiorari denied, 376 U.S. 944.

[5] The appellants argue that the court erred in considering public statements made by legislators concerning the enactment of Act 147. Such statements are the traditional material from which legislative history is compiled. *Humphrey's Executor* v.

The court did not, however, rest its decision solely on the finding that Act 147 was *intended* to promote the establishment and maintenance of a system of segregated schools; there was also ample evidence that the statutory purpose had been fully effectuated. Thus, it was found that the tuition grant system had in fact provided "the financial means necessary to establish and maintain" the segregated private schools organized in its wake. Clearly, Act 147 had "significantly involved" the State in the racially discriminatory practices of some seventy-eight recipient private schools. See, *e.g.*, *Cooper* v. *Aaron*, *supra*; *Anderson* v. *Martin*, 375 U.S. 399; *Lombard* v. *Louisiana*, 373 U.S. 267; *NAACP* v. *Alabama*, 357 U.S. 449; *Hamm* v. *Virginia State Board of Elections*, 230 F. Supp. 156, affirmed *per curiam sub nom. Tancil* v. *Woolls*, 379 U.S. 19. Whatever the merits of the "predominant support" criterion adopted in *Griffin* v. *State Board of Education*, 239 F. Supp. 560 (E.D. Va.), the court below was justified in not following it here.* Here—

United States, 295 U.S. 602; *Standard Oil Co.* v. *United States*, 221 U.S. 1. In reviewing such expressions of purpose, the court correctly admitted newspaper accounts, accompanied by the sworn statements of the authors as to their presence at the event and the accuracy of their reports, since Louisiana maintains no official records of legislative debates or committee proceedings and no verbatim transcript is available. See, *e.g.*, *United States* v. *Louisiana*, 225 F. Supp. 353, affirmed, 380 U.S. 145; *Hall* v. *St. Helena Parish School Board*, 197 F. Supp. 649, affirmed *per curiam*, 368 U.S. 515; *Davis* v. *Schnell*, 81 F. Supp. 872, affirmed *per curiam*, 336 U.S. 933.

*The district court was also correct in rejecting the appellant's argument that it was bound, in passing on the constitutionality of the state action, by the definition contained in Title IV of the Civil Rights Act of 1964 of a "public school"

unlike the Virginia case—the court found the statute discriminatory in both purpose and effect, and concluded that the State could not effectively disentangle its involvement in the segregationist scheme by simply limiting the scope of the law. At least in the Louisiana context, it would be difficult to condone as "neutral" State payments made to segregated schools pursuant to a statute conceived in the hope of perpetuating educational discrimination even when the grants constitute less than half the school's operating funds. In the circumstances, we submit the court below was wholly warranted in striking down the whole of the statute and the attendant scheme.

CONCLUSION

For the reasons stated, the judgment of the court below should be affirmed.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

JOHN DOAR,
Assistant Attorney General.

DECEMBER 1967.

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as one wholly or predominantly operated by government funds. By its very terms, that definition is given only for the purposes of Title IV and does not purport to limit the jurisdiction of the federal courts in defining the obligation of states under the Fourteenth Amendment.

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LOUISIANA FINANCIAL ASSISTANCE COMMISSION, *et al.*,

Appellants,

—v.—

BRYAN POINDEXTER, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

MOTION TO AFFIRM

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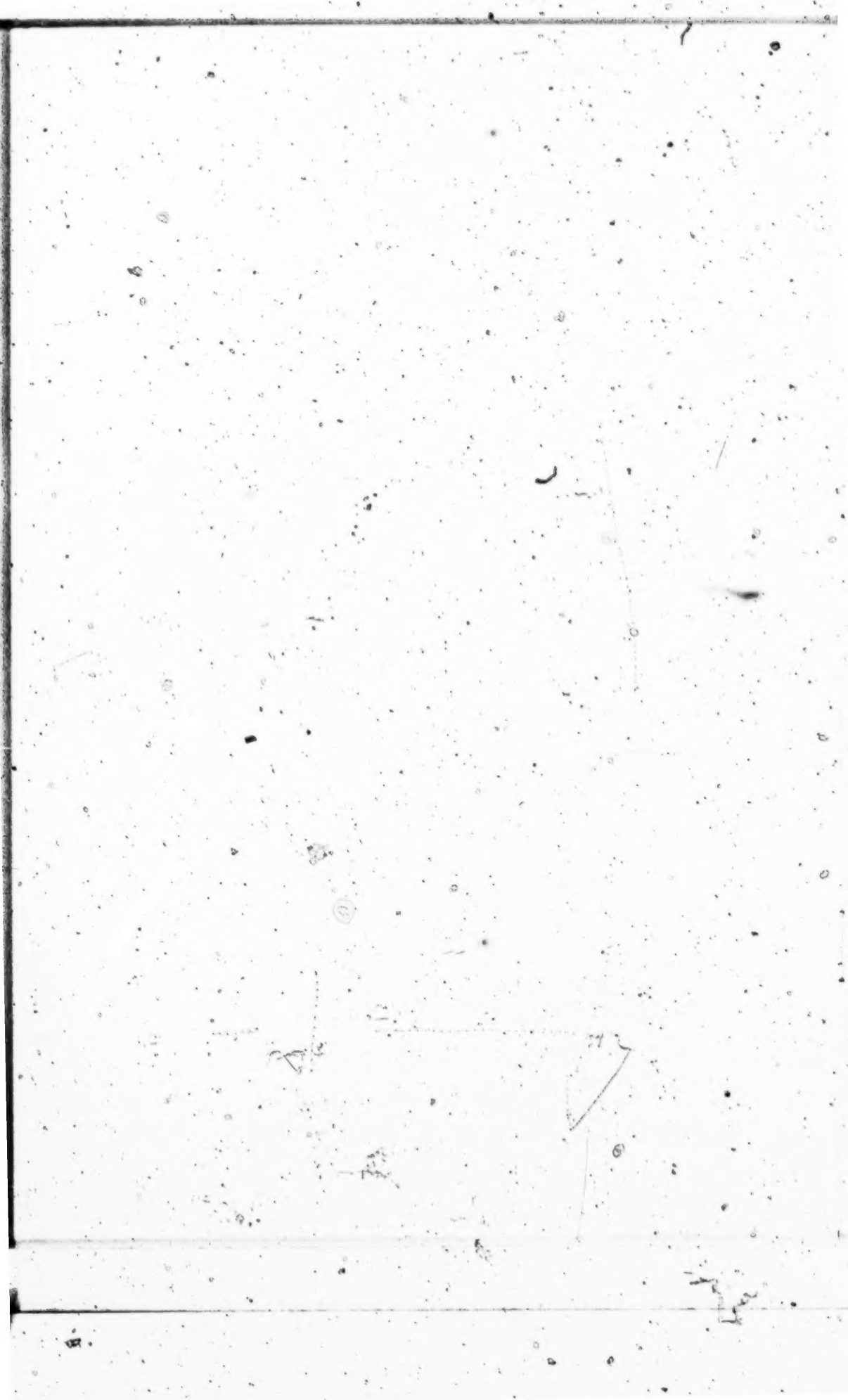

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Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

MOTION TO AFFIRM

Appellees Bryan Poindexter, et al., respectfully move the Court, pursuant to Rule 16(1)(c) of the Rules of the Court, to affirm the judgment below and in support thereof would show that plenary consideration of this appeal is unnecessary because the decision below is clearly correct.

Citations to Opinions Below

The judgment below and the opinion supporting it, of August 2, 1967, is not yet reported. The earlier decision of August 3, 1966 is reported at 258 F. Supp. 158 (E.D. La. 1966). (See Jurisdictional Statement, Appendix pp. 1, 17).

Jurisdiction

Jurisdiction of this appeal is founded upon 28 U.S.C. §1253, in that injunctive relief was sought and obtained from a three-judge district court constituted pursuant to 28 U.S.C., §§2281 and 2284 against the enforcement of a statute of the State of Louisiana on the ground that it violates the Constitution of the United States both on its face and as applied.

Question Presented

Did the court below abuse its discretion in enjoining the enforcement of Act 147 of the 1962 Louisiana Legislature after finding that the purpose and effect of that statute was to create and maintain a separate, racially segregated "private" school system with state support?

Statement of the Case

This action was commenced as a class action on June 29, 1964 *challenging* the constitutionality of Act 147[1] of the 1962 Session of the Louisiana Legislature. Plaintiffs were upheld in their contention that the origin and purpose of that statute made it unconstitutional both in itself and in its application because it was designed to create and maintain a separate, racially segregated school system at public expense.[2]

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[1] LSA-R.S. §§17:2951-2959.

[2] Appellants' Statement of the Case, at p. 5, misstates what appellees have asserted in their complaint and at oral argument on the motion to dismiss. They state: "[Appellants] do not ask in their complaint that Act 147 of 1962 be declared unconstitutional and their counsel stated in oral argument that their decision not to do so was deliberate and declined to amend their complaint in this respect when the Court suggested that

Act 147 created the Louisiana Financial Assistance Commission and empowered it to pay out tuition grants to qualified pupils to attend private non-sectarian schools throughout the state. The Act requires that pupils, to qualify, be eligible for admission to public schools. The grant program is to be maintained by sales tax dedications to a fund to be administered by the Commission in amounts up to $300,000 per month (as of the 1963 fiscal session of the Legislature). Grants are payable directly to the pupil or his parent or guardian rather than to the school or jointly.

The Commission and the other defendants filed motions to dismiss in June and July of 1964 contending that since plaintiffs' complaint challenged the use by Louisiana of public funds, plaintiffs lacked standing to challenge Act 147 in federal court.[3] The district court overruled their motions in its opinion and order of August 3, 1966:

> The defendants' motion to dismiss the action for lack of standing rests on their analysis of the com-

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they do so." True, plaintiffs did not explicitly move for a declaratory judgment, but both in their complaint (Complaint, pp. 5, 6) and in the argument (Transcript of Hearing, March 19, 1965, pp. 41-44) it is clear that the asserted premise for injunctive relief was both the facial unconstitutionality of Act 147 and its unconstitutionality as applied. It was clearly argued that plaintiffs considered that the district court could not issue the injunction sought unless it first determined that Act 147 was unconstittuional either or both on its face and in application (id. 44).

[3] Defendants' position in their motions to dismiss, and here, are identical. As here, defendants assert that cases decided by this Court such as *Frothingham* v. *Mellon*, 262 U.S. 447 (*Massachusetts* v. *Mellon*, 262 U.S. 447) foreclose private parties from challenging state functions as remote as the distribution of public benefits made available through tax levies. This view, of course, overlooks the obvious answer that plaintiffs were not challenging the right of the state to distribute money to students to attend private schools, but rather the distribution of money for the purpose of supporting institutions practicing racial segregation. See 258 F.Supp. at p. 162.

> plaint as asserting only a state claim that belongs, if it belongs anywhere, in state courts. . . . In short, so the defendants say, the plaintiffs' suit is nothing more than a taxpayer's suit to enjoin the state's unlawful expenditure of public funds for private purposes. Snowden v. Hughes, 1944, 321 U.S. 1, 6, 64 S.Ct. 397, 88 L.Ed. 497, 501; Dinwiddie v. Brown, 5 Cir. 1956, 230 F.2d 465; Hanna v. Home Insurance Company, 5 Cir. 1960, 281 F.2d 298.
>
> The defendants' argument rests on a misunderstanding of the nature of the plaintiffs' rights. The plaintiffs are not suing as Louisiana taxpayers objecting to the legislature's violation of the State Constitution. They assert federal rights protected by the United States Constitution. (258 F.Supp. at 162)

The trial court also concluded that this case was proper for determination by a three-judge court under 28 U.S.C. §2281 since the petition challenged a statewide policy in its attack upon the constitutionality of the statute (258 F. Supp. at 165).

At trial, March 20 through March 22, 1967, the Court considered massive evidence to determine "the purpose, mechanics, and effect" of Act 147, "[t]he extent to which the tuition grants contributed to the founding of the quasi-public schools, in dollars as a stimulus, the extent to which the grants . ... contribute to the support of the quasi-public schools, the extent of state involvement and control, and other factors relevant to state action . . ." (258 F. Supp. at 164, 165).

Legislative purpose was determined by examining the historical context in which the statute was enacted. The Court started with the earliest efforts of Louisiana to

create and maintain segregated schooling, then focused on the Legislature's elaborate more recent attempts to thwart this Court's mandate in *Brown v. Board of Education*, 347 U.S. 483 (1954).[4]

After examining the context of the statute and the statements of persons responsible for its introduction and passage, as well as its design, the Court concluded that present Act 147 did not depart significantly from its predecessor, Act 3, declared unconstitutional in *Hall* v. *St. Helena Parish, supra.* (J. S. App., p. 31). Borrowing a phrase from the opinion in *Lee* v. *Macon County School Board*, 267 F. Supp. 458, 477 (M.D. Ala. 1967 aff'd sub nom.

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[4] Most of these devices of evasion are reflected in litigation in this same district court. In 1954, Article XII, §1, of the 1921 Constitution was amended to require separate public schools for white and Negro children. Acts 555 and 556 implemented this constitutional requirement and were stricken in February 1956 in *Bush* v. *Orleans Parish School Board*, 138 F.Supp. 337 (E.D. La. 1956), aff'd. 242 F.2d 156, cert. denied 354 U.S. 921. In 1956 Act 319 was passed to freeze the existing racial status of public schools in Orleans Parish and gave the Legislature the power of racial re-classification. This was declared unconstitutional in *Bush*, 163 F.Supp. 701, aff'd. 268 F.2d 78. In 1958, Acts 257 and 258 provided for the establishment of educational cooperatives and Louisiana's first grant-in-aid system for "children attending non-sectarian, non-public schools." In 1960 the Louisiana Legislature authorized the Governor to close integrated schools or any public schools faced with the threat of riots or disorder and the Attorney General of Louisiana obtained an injunction restraining the Orleans Parish School Board from desegregating its schools. Later, the Governor took over control of the Orleans Parish Public Schools and in August of 1960 a three-judge district court invalidated these actions and the underlying statutes in *Bush*, 187 F.Supp. 42, aff'd. 365 U.S. 569. In five extraordinary sessions of the Legislature, laws were passed authorizing the Legislature to seize all funds of the Orleans Parish School Board, prevent banks from loaning money to the Board, and to take over control of the Board generally. These actions were declared unconstitutional in *Bush*, 188 F.Supp. 916, aff'd. 365 U.S. 569; *Id.* 191 F.Supp. 871, aff'd. 367 U.S. 907; *Id.* 194 F. Supp. 182, aff'd. 367 U.S 907, 368 U.S. 11. Finally, Act 3 of the Second Extraordinary Session of 1960, the Legislatures' second version of grants-in-aid, was declared unconstitutional in *Hall* v. *St. Helena Parish School Board*, 197 F.Supp. 649 (E.D. La. 1961), aff'd. per curiam, 360 U.S. 515.

Wallace v. *United States,* No. 489, 36 U.S. L. Week 3225 (U.S. Dec. 5, 1967), the Court stated that the present tuition statute was "designed to fill the vacuum of [the] court's injunction against the [earlier] tuition statute.":

> Thus, for a hundred years, the Louisiana legislature has not deviated from its objective of maintaining segregated schools for white children. Ten years after *Brown,* declared policy became undeclared policy. Open legislative defiance of desegregation orders shifted to subtle forms of circumvention—although some prominent sponsors of grant-in-aid legislation have been less than subtle in their public expression. But the changes in means reflect no change in legislative ends.

Turning to the effects of the statute, the Court found from a thoroughly developed record that "tuition grants have supplied a heavy predominance of funds needed to establish and maintain post-1954 and especially post-1962 private segregated schools." (J. S. App. pp. 34, 35, 45). The Commission contended that a resolution adopted by it to limit grants to schools not "predominantly maintained" by the grants saved its constitutionality within the test used by the three-judge court in *Griffin* v. *State Board of Education,* 239 F. Supp. 560 (E.D. Va., not appealed), and the definitions of a "public school" contained in Title IV of the Civil Rights Act of 1964. The Court rejected this contention on the ground that the question of involvement turned on whether the state was "significantly" involved, the test adopted by this Court in *Burton* v. *Wilmington Parking Authority,* 365 U.S. 715 and that "[o]nly by sifting facts and weighing circumstances can the non-obvious involvement of the State in private conduct be attributed its true signifiance." 365 U.S. at 723 (J. S. App., p. 34).

Notice of Appeal was filed in the district court on September 8, 1967. Appellants moved Mr. Justice Black for a stay of the injunction, but it was denied on September 2, 1967.

ARGUMENT

The District Court Was Clearly Correct in Concluding That Act 147 Violates the Fourteenth Amendment to the United States Constitution.

The tack of the lower court's opinion, in determining the constitutionality of Act 147 through an examination of its purpose and effect, is faithful to the course of decisions by this Court. It is quite appropriate to consider the historical context of a statute as part of the relevant circumstances surrounding its enactment. See, e.g., *Grosjean* v. *American Press Co.*, 297 U.S. 233; *Griffin* v. *School Board of Prince Edward County*, 377 U.S. 218, 231; *Louisiana* v. *United States*, 380 U.S. 145. An examination of the context, unlike a search for the motives of legislators, may reveal that a particular enactment is really part of a scheme or systematic development to preserve segregated schooling. The record here buttresses the Court's conclusion that Act 147 is no more than a more sophisticated substitute for the earlier tuition grant statute invalidated in *Hall* v. *St. Helena Parish School Board*, 197 F. Supp. 649, aff'd per curiam, 368 U.S. 515.

A parallel course was taken by the district court in Alabama whose judgment was recently approved by this Court, *Lee* v. *Macon County Bd. of Education*, 267 F. Supp. 458 (M.D. Ala. 1967), aff'd sub nom. *Wallace* v. *United States*, No. 489, 36 U.S. L. Week 3225 (U.S. Dec. 5, 1967):

> Alabama's present tuition statute must be analyzed in the historical context which gave rise to its enact-

> ment. It is unmistakably clear that the concept of tuition grants to students wishing to attend private schools in Alabama was born of an effort to resist and frustrate implementation of the *Brown* decision. (267 F. Supp. at 476).

Whatever the merits of the "predominant support" standard of *Griffin* v. *State Board of Education*, 239 F. Supp. 560 (E.D. Va.), the origin and effect of Act 147 work to distinguish it from the Virginia case. Correctly, the court below concluded that unlike Virginia the purpose of Louisiana's tuition grant program was not just to "encourage and not just to authorize private racial discrimination in the field of education. The purpose was to *establish and maintain* 'private' segregated schools." (emphasis added) (J. S. App. p. 54). State action is present in the making of the grants, and "[t]here is no such thing as the State's being just a little bit discriminatory." (J. S. App. p. 20).

It may be appropriate to employ the "predominant support" standard of *Griffin* and Title IV of the 1964 Civil Rights Act to determine what kind of institutions are "public" for purposes of desegregating them, but certainly the district court was correct in concluding that the state cannot supply any significant amount of support to an institution practicing racial segregation. Thus, the court below was clearly correct in determining that Louisiana could not use any statutory scheme to lend support to the establishment and maintenance of racially segregated educational institutions.

CONCLUSION

For the foregoing reasons, the judgment of the court below should be affirmed.

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Bryan Poindexter, et al.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 793

LOUISIANA FINANCIAL ASSISTANCE COMMISSION, et al

Appellants

v.

BRYAN POINDEXTER, et al and
UNITED STATES OF AMERICA,

Appellees

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

BRIEF IN OPPOSITION TO MOTION TO AFFIRM

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TO THE HONORABLE CHIEF JUSTICE AND
ASSOCIATE JUSTICES OF THE SUPREME COURT
OF THE UNITED STATES

MAY IT PLEASE THE COURT:

Pursuant to Rule 16 4. of the Rules of this Court, Louisiana Financial Assistance Commission and its officers and

members file this brief in opposition to the motion to affirm filed by the United States.

This Honorable Court held in *Griffin v. County School Board of Prince Edward County*, 377 U.S. 218 that "The injunction against paying tuition grants and giving tax credits **while public schools remain closed** is appropriate and necessary since those grants and tax credits have been essential parts of the county's program, successful thus far, to deprive petitioners of the same advantages of a public school education enjoyed by children in every other part of Virginia." (page 233) (our emphasis)

Thereafter, in *Griffin v. State Board of Education*, 239 F. Supp. 560, a court constituted under 28 U.S.C. § 2281 to consider the constitutionality of Virginia's tuition grant statutes explicitly held "that they are not unconstitutional on their face, as fostering forbidden race distinctions; (2) that the grants may lawfully be used in a private, segregated, nonsectarian school if they do not constitute the preponderant financial support of the schools." (p. 562)

That court reached the conclusion stated independently of the Civil Rights Act of 1964, 78 Stat 241, 42 USC § 1971, but it referred to the definition in § 2000c (c) of "Public School" as one "operated by a state, subdivision of a state, or governmental agency within a state, or operated wholly or predominantly from or through the use of governmental funds or property, or funds or property derived from a governmental source." (our emphasis)

Although the court enjoined payment of tuition grants to pupils attending certain named schools where the grants exceeded the limits set, Virginia continues tuition grants to students attending schools which are not so preponderantly supported even if children of both races are not enrolled.

The decision in the present case is diametrically opposed o the decision in the Virginia case. Not because of the measure f funds, but because of what the court said is the policy of ouisiana, it declared the Louisiana tuition grant statute un-onstitutional per se even though Louisiana's public schools re wide open and largely integrated in fact as well as under ourt order to integrate, and even though the Louisiana sta-ute is not triggered or activated by considerations of race, nd even though children of both races receive tuition grants.

Thus, there is no way to harmonize the Virginia decision n *Griffin* and the Louisiana decision in *Poindexter*. The court f Louisiana clearly recognizes this, and not being bound by *Griffin* from which no appeal was taken, chose to go a differ-nt way.

The Solicitor General, too, recognizes the impossibility f harmonizing the two decisions for he says on page 8 of the notion to affirm—"Whatever the merits of the 'predominant upport' criterion adopted in *Griffin v. State Board of Educa-ion*, 239 F. Supp. 560 (E.D. Va.) the court below was justified n not following it here"—which he relates to purposes. He hen seeks to make a distinction between events in Virginia nd those in Louisiana as if such a comparison benefitted the 'irginia statute, utterly ignoring the pronouncement of this 'ourt in the earlier *Griffin* case from which we have quoted bove.

To argue that Virginia may make tuition grants within mits but that Louisiana may not make tuition grants within ie same limits because it is said that the statute in Louisiana as "conceived in the hope of perpetuating educational dis-rimination" (page 9 of motion to affirm) is to ignore the istory recorded by Your Honors in 377 U.S. 218, 221 as the massive resistance" in Virginia, and the undisputed fact

that no public schools were closed in Louisiana, no Louisiana Governor blocked the way of students, and the present Louisiana Governor is on record in this very case that the Louisiana tuition grant statute will not in anywise be used to replace the public school system.

It is not reasonable to say a public school means one thing with respect to state funds and another with respect to federal funds.

But above all, it is not reasonable to say that the Constitution of the United States means one thing in Virginia but another in Louisiana so that a statute constitutional in Virginia is unconstitutional in Louisiana.

We respectfully submit the motion to affirm should be denied and the appeal should be heard so that there may be uniformity in the meaning of our Constitution throughout our land.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Victor A. Sachse, one of the Attorneys for the Louisiana Financial Assistance Commission, its officers and members, appellants, herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 11th day of December, 1967, I served copies of the foregoing Brief in Opposition to Motion to Affirm on the several parties thereto; as follows:

1) On the United States, a plaintiff-intervenor, by air mailing copies thereof to Erwin H. Griswold, Solicitor General and John Doar, Assistant Attorney General, Department of Justice, Washington 25 D.C., Louis Lacour, Esq., United States Attorney for the Eastern District of Louisiana, at 400 Royal Street, New Orleans, Louisiana, Hugh W. Fleischer, Esq., United States Department of Justice, 1723 Masonic Building, New Orleans, Louisiana.

2) On Bryan Poindexter, a minor, by Lorraine Poindexter, his mother and next friend; Alfred Louis Larks, a minor, by Charles Larks and Cora Lee Larks, his parents and next friends; Anthony Jarrow, a minor, by Peter Jarrow and Ruby Jarrow, his parents and next friends; on behalf of themselves and other Negro Children and their parents similarly situated, by air-mailing a copy thereof to A. P. Tureaud and A. M. Trudeau, Esqs., 1821 Orleans Avenue, New Orleans, Louisiana 70116 and Jack Greenberg, Charles H. Jones, Jr., and Henry Aaronson, Esqs., 10 Columbus Circle, New York, New York.

3) On Mrs. Thelma Deamer, Carroll Leach, Rosetta Jiles and Mrs. Fannie Magee, defendant-intervenors, by air mailing copies thereof to Cy Courtney, Esq., National Bank of Commerce Building, New Orleans, Louisiana 70112, and Richard

Cadwallader, Esq., Louisiana National Bank Building, Baton Rouge, Louisiana.

4) On Garden District Academy, defendants, by air mailing copies thereof to Sydney J. Parlongue, Esq., National Bank of Commerce Building, New Orleans, Louisiana 70112.

5) On Ninth Ward Elementary School and Armond J. Duvio, and Carrollton Elementary School Association, defendants, by air mailing copies thereof to Walter E. Doone, Esq., Room 205, Southern Marine and Aviation Building, New Orleans, Louisiana 70112.

6) On Louisiana State Board of Education, defendant, by mailing copies thereof to Frank L. Dobson, Esq., Attorney General's Office, Capitol Building, Baton Rouge, Louisiana.

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SUPREME COURT OF THE UNITED STATES

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LOUISIANA FINANCIAL ASSISTANCE COMM'N ET AL. *v.* POINDEXTER ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA.

No. 793. Decided January 15, 1968.

PER CURIAM.

The motion to affirm is granted and the judgment is affirmed.